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A

TREATISE

ON

CRIMES

AND

MISDEMEANORS.

IN TWO VOLUMES.

VOL. I.

By WM. OLDNALL RUSSELL,
OF LINCOLN'S INN, ESQ. BARRISTER-AT-LAW.

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TO

SIR ROBERT GIFFORD,

ATTORNEY GENERAL OF ENGLAND,

THIS WORK

IS DEDICATED:

A SMALL TRIBUTE

TO

HIS GREAT PROFESSIONAL ATTAINMENTS;

TO

HIS DESERVED HONOURS;

AND TO

THE AMIABLE AND EXCELLENT QUALITIES

BY WHICH

HIS CHARACTER

IS

DISTINGUISHED

AND

ADORNED.

PREFACE

IN the following TREATISE I have attempted to dispose, in an appropriate arrangement, the principles of the common law, the statutes, and the decided cases relating to every offence which may be made the subject of prosecution by indictment; except only that of High Treason. The substance of the law of crimes and misdemeanors, contained in the Works of Hale, Hawkins, Foster, Blackstone, East, and Leach, has been carefully collected; and to this important matter cases from the various printed reports have been added, together with such MS. cases as I was able to obtain, and of the authenticity of which I had reason to be satisfied. I have anxiously endeavoured so to make the selections and citations as not to load the work with any superfluous matter, and yet to supply the necessary information as well to those who, in a

judicial character, may be called upon to carry the criminal law into execution, as to those who may be engaged either in the prosecution or defence of a party indicted.

The crime of High Treason was not originally included in the plan of this Work, on account of the great additional space which the proper discussion of that important subject would have occupied; and because prosecutions for that crime, happily not frequent, are always so conducted as to give sufficient time to consult the highest authorities. But it was a part of the original plan to have subjoined a copious chapter or book upon the law of Evidence in criminal prosecutions; and it was not till I had made considerable progress, and ascertained the length to which the work would necessarily extend without such addition, and also the impossibility of finishing it even in its present shape without considerable professional sacrifices, that such part of the original plan was, for the present, abandoned. But though the law of Evidence on criminal prosecutions is not fully treated of, I should observe that the points relating to Evidence and the competency of witnesses which apply more immediately to particular offences are for the most part introduced in the conclusions of the several Chapters.

The subject of Process, and other matters of Practice in criminal prosecutions, having been so lately treated of by a learned author,* are not introduced into this Treatise; and it seemed also, that in a work which is intended to offer only that which may be useful to the public, it would be deemed superfluous to insert precedents of Indictments which have been so abundantly supplied in several modern publications.† And neither the object of the work, nor its reasonable limits, would admit the introduction of the law relating to minor offences cognizable only by summary proceedings before Justices of Peace, which are, therefore, only occasionally mentioned where they appear to explain, or to be closely connected with offences of a higher degree.

It would not become me on the present occasion, to omit the expression of my best thanks and acknowledgments to Sir Edward Hyde East, for the assistance which I have derived from his laborious and most learned Treatise: and I gladly also take this opportunity of thanking Mr. Chetwynd, the learned Chairman of the Quarter Sessions for the County of Stafford, for many friendly

* See the First Volume of Mr. Chitty's Criminal Law, published in 1816.

† The Crown Circuit Companion (8th Ed.); Mr. Starkie's Treatise on Criminal Pleading; and Mr. Chitty's second and third volumes of his Treatise on Criminal Law.

communications, rendered peculiarly valuable by his long and close application to the study of the criminal laws of the country.

How far the pains which I have taken with this Treatise may be rewarded with the approbation of those for whose use it is intended, is a subject, on which the hopes I may venture to entertain cannot but be clouded with apprehensions which my late attentive and minute examination of the works of others has not been calculated to allay. The most cheering reflection under such circumstances is, that those who are best qualified to judge of the merits, will be most likely to take into consideration the great difficulties of the undertaking, and most disposed to criticise in the same kind spirit with which Dr. Burn, after pointing out one of the errors in the work of a celebrated writer on the crown law, says: "This is only remarked as an instance, "that in a variety of matter it is impossible for "the mind of man to be always equally atten-"tive."

WM. OLDNALL RUSSELL.

5, *Old Square, Lincoln's Inn,*
7th July, 1819.

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ERRATA,

CORRIGENDA, ET ADDENDA.

11, Note (*f*) Add—In Steel's case, 1 Leach 451, A prisoner who could not hear, and could not be prevailed upon to plead, was found mute by the visitation of God, and then tried, found guilty, and sentenced to be transported. And in Jones's case, 1 Leach 102, where the prisoner (who was indicted on 12 Anne, c. 7. for stealing in a dwelling-house) on being put to the bar, appeared to be deaf and dumb; and the jury found a verdict, "Mute by the visitation of God;" after which a woman was examined upon her oath, as to the fact of her being able to make him understand what others said, which she said she could do by means of signs, was arraigned, tried, and convicted of the simple larceny.

26, Note (*g*) Add—But *qu.* and see 1 Hawk. P. C. c. 81. s. 6. and *post.* Chap. xxiii.

38, Note (*f*) Add—And all the Judges were of opinion that this case is good in law, in Wells's case, 1 East. P. C. c. 8. s. 7. p. 414. 1 Leach 360, in the note. And see also 2 Hawk. c. 33, s. 98, 99.

45, Note (*l*) Add—But see 2 East. P. C. c. 21. s. 9, where it is said that Lord Hale, and Foster J. were decidedly of opinion that principals in arson were virtually

excluded from the benefit of clergy by the stat. 4 & 5 P. and M. c. 4, which excluded the accessory before.

62, Note (*u*) Add—And see 1 Hawk. P. C. c. 55.

66, Note (*n*) Add—But not if the statute relate merely to private rights. "Many public acts are passed which "regulate private rights; but it never was con- "ceived that an indictment lay on that account, "for an infringement of such rights." Rex *v.* Richards, 8 T. R. 637. *Per Cur.*

66, Note (*p*) Add—And see the cases collected in Rex *v.* Dickinson, 1 Saund. 135, note (4)

66, Note (*s*) Add—And see Faulkner's case, 1 Saund. 250. *c.* note (3).

69, Note (*i*) In a late case it is stated to have been held, that no indictment will lie for procuring the marriage of a female pauper with a labouring man of another parish, who is not actually chargeable. Rex *v.* Tenner and Another. 1 Esp. 304.

140, Line 23, add—The 48 Geo. III. c. 130, s. 7, 10, and 49 Geo. III. c. 122, s. 1. and s. 13. 16, relate to the unlawfully keeping possession of anchors and other materials belonging to ships, and the receiving of such stolen articles, &c.

166, Note (*f*) line 16, instead of 28 Geo. III. c. 25, *read* 28 Geo. III. c. 23.

167, Note (*n*) instead of 2 Leach, *read* 1 Leach.

170, line 4, add—In a case where the defendant was indicted for assaulting and beating a custom-house officer in the execution of his office, a motion was made to quash the indictment, on the ground that this statute in-

flicts a penalty, and prescribes the particular method of punishing the offence, namely, by the Justices of Peace, by fine and imprisonment, and that therefore no indictment lay for the offence; and the indictment was quashed. (*a*)

185, Note (*x*) Add—And see the case of Rex *v.* Knight and Roffey, 2 East. P. C. c. 15, s. 22. p. 510. that the circumstances of goods being found in oil-cases, or in great quantities in an unentered place, will be sufficient to throw the proof of the duties being paid on the other party.

211, Note (*l*). After Beeley *v.* Wingfield, 11 East. 46, add—And see also Baker *v.* Tounsend, 7 Taunt. 422.

212, line 4, add—But it does not apply to offences cognizable only before magistrates; and an indictment for compounding such an offence was holden bad in arrest of judgment. (*b*)

212, Note (*q*) Add—But *qu.* and see Rex *v.* Crisp and Others, 1 Barnw. and Ald. 286 and 287.

226, Note (*w*) Add—In Rex *v.* Burder, 4 T. R. 778, it was held that an appointment of an overseer for the poor, *for the year next ensuing*, must be understood to be for the *overseer's year:* and an indictment that the defendant was appointed "overseer of the poor of the parish of *A.*" and that he afterwards refused "to take the said office of overseer of the parish to which he was so appointed," was held good on demurrer.

242, line 3, add—An action will lie, though the party bribed does

(*a*) Anon. 2 Ld. Raym. 991. 3 Salk. 189. In 2 Ld Raym. 991, Reg. *v.* Watson is cited as a case where the same point was resolved by all the Judges two years before.

(*b*) Rex *v.* Crisp and Others, 1 Barn. & Ald. 282.

not vote according to the bribe. Sulston *v.* Norton, 1 Black. Rep. 317, and Orme 296, notes.

281, Note (*i*) Add—And per Heath J. in Rex *v.* Wylie and Another, 1 N. R. 95.

283, Note (*b*) Add—But see 5 Evans's Col. Stat. 347, where it is said that the enactment in 4 Ed. I. c. 5. did not relate to marriage during the life of a former husband or wife, as being a substantive felony, but to the excluding from the privilege of clergy persons convicted of any other felony, who had been twice married, or who had married a widow or widower which by the later statute, 1 Edw. VI. c. 12. s. 16. was abrogated.

287, Note (*m*) line 10, after Dow's Rep. 117, add—In 5 Evans's Col. Stat. 348, note (4), it is said that Thompson, B., stated the opinion of the Judges to be—1. That a marriage lawfully contracted in England cannot be dissolved in a different country, by any authority whatever; and—2. That the proviso relates only to the sentences of courts in England.

289, Note (*t*) line 2, for 2 Chit. Crim. L. *read* 3 Chit. Crim. L.

294, line 8. add, note, Rex *v.* Burton-upon-Trent, 3 M. and S. 537.

310, after the last line, add—And the Court of King's Bench has gone to the extent of granting a criminal information, for publishing in a newspaper a statement of the evidence given before a coroner's jury, accompanied with comments, although the statement was correct, and the party had no malicious motive in the publication. (*c*)

331, Note (*f*) add—And see in Herriott *v.* Stuart, 1 Esp. 437, and Stuart *v.* Lovell, 2 Stark. R. 93, that the

(*c*) Rex *v.* Fleet, 1 Barnw. & Ald. 379.

editor of one public newspaper is not justified in attacks upon the private character of the writer of another public newspaper.

340, Note (*g*) add—And see *ante*, 334, a further publication is necessary to support an action. Thus it has been held, that where the action was brought for a libel contained in a letter transmitted by the defendant to the plaintiff by means of a third person, it is a question for the jury, whether there has been any publication, except to the plaintiff himself; and that, if there has not, the defendant is entitled to their verdict. Clutterbuck *v.* Chaffers, 1 Stark. R. 471. But in another case of an action for a libel, contained in a letter written by the defendant to the plaintiff, it was holden, that proof that the defendant knew that the letters sent to the plaintiff were usually opened by his clerk, is evidence to go to the jury of the defendant's intention that the letter should be read by a third person. Delacroix *v.* Thevenot, 2 Stark. R. 63.

348, Note (*f*) add—In a late case of an action for a libel, contained in the Statesman newspaper, *subsequent* publications by the defendant in the Statesman newspapers were tendered in evidence to shew *quo animo* the defendant published the paragraphs in question. Lord Ellenborough said, "No doubt "they would be admissible in the case of an in- "dictment; and so they would here shew the in- "tention of the party if it were at all equivocal: "but if they be not admitted for that purpose, they "certainly are not admissible for the purpose "of enhancing the damages." Stuart *v.* Lovel, 2 Stark. R. 93.

440, after the last line, add—A late act, however, 42 Geo. III. c. 119., declares all games or lotteries, called *Little Goes*, to be public nuisances, and provides for their suppression; and also imposes heavy pe-

nalties upon persons keeping offices, &c. for lotteries not authorised by parliament.

457, line 36, add note—(*d*) These notices must be given in case of an appeal against an inclosure of a highway, by virtue of a writ of *ad quod damnum;* and a notice to the party interested is not alone sufficient: indeed the act is express upon this point. Rex *v.* The Just. of Essex, 1 Barnew. and Ald. 373.

469, Note (*u*) add—This applies to individual persons only, and not to an aggregate of persons who compose the inhabitants of a district or division in a parish or township. Rex *v.* Ecclesfield, 1 Barnew. and Ald. 348.

480, Note (*g*) add—In Rex *v.* Ecclesfield, 1 Barnew. and Ald. 350, 351., J. Williams arguend. denied that such traverse is demurrable, and said that Rex *v.* The Inhabitants of Glamorgan contained such a traverse, (2 East. 356, in notes,) and that the better precedents have always inserted it. Supposing such traverse to be necessary, it is sufficiently expressed by a plea concluding thus: "And that the in- "habitants of the said parish at large ought not "to be charged with the repairing and amending "the same."

481, line 23, add—And such a plea will be good, although it does not state any *consideration* for the liability of the inhabitants of the district. (*d*)

484, in the margin—Instead of "after a conviction," *read* "after an acquittal."

484, note (*h*) add—But in a recent case, where the defendants had been acquitted on an indictment for not repairing a road, the Court of King's Bench, though they refused a new trial, yet, upon very special

(*d*) Rex *v.* Ecclesfield, 1 Barnew. and Ald. 348.

circumstances, suspended the entry of the judgment, so as to enable the parties to have the question reconsidered upon another indictment, without the prejudice of the former judgment. Rex *v.* The Inhabitants of Wandsworth, 1 Selw. and Barnew. 63.

497, Note (*g*) instead of *Ante*, 401. *read Ante*, 469.

525, Note (*y*) instead of 1 Leach 155. *read* 2 Leach 549.

537, line 18. add, By the 31 Geo. III. c. 46. s. 3. Every governor of the places of confinement to be used as houses of correction or penitentiary houses, and his assistants have the same power over offenders confined therein as are incident to the office of a sheriff or of a gaoler; and are, in like manner, to be answerable for the escape of any offender. The same section also enacts, that if any person having the custody of an offender, ordered to hard labour, as an assistant, shall voluntarily or negligently permit such offender to escape, he shall be punished as by 19 Geo. III. c. 74. s. 66. namely, for voluntarily permitting an escape, shall be guilty of felony; and, for negligently permitting an escape, shall be guilty of a misdemeanor, and liable to fine and imprisonment, or both. The fourth section adopts the provisions of the 19 Geo. III. c. 74. s. 67. as to the evidence upon a prosecution for such escapes; and enacts, that a copy properly attested, of the certificate thereinbefore directed to be given to the sheriff or gaoler, by the clerk of the assize, &c. and by such sheriff or gaoler to be delivered, together with the offender, to the governor, and by the governor to be transmitted to the clerk of the peace, to be filed with the records of the sessions, shall, after proof that the person then in question is the same, delivered with such certificate, be sufficient evidence not only of the nature and fact of the conviction itself, and the

species of confinement to which such person was ordered; but also that the person then in question is the same that was so convicted and ordered to such confinement.

31 Geo. III. c. 46. Persons ordered to hard labour breaking prison or escaping.

552. Add—But the statute 31 Geo. III. c. 46. (entitled an act for better regulating of gaols and other places of confinement) may be mentioned in this place, as its provisions are of a general nature. The third section enacts that if any person ordered to hard labour shall, at any time, during the term for which he shall be so ordered, break prison or escape from the place of confinement, or in the conveyance to the same, or from the person having him in lawful custody, such offence shall be punished in the same manner as under the 19 Geo. III. c. 74. s. 65. namely, in case the person was so ordered to hard labour instead of being capitally punished, such offender breaking prison or escaping shall be guilty of felony without benefit of clergy; and in case the person was so ordered to hard labour instead of transportation, then the punishment to be an addition of three years to the term of confinement, and if any second escape or breach of prison shall take place, such person is also to be guilty of felony without benefit of clergy. The fourth section of the act enacts that the provisions of the 19 Geo. III. c. 74. s. 67. as to the trial of the offender in the county where he is retaken, and as to a copy of a certificate being evidence of a conviction, shall extend to any prosecution for escape or breach of prison under this act. (*e*)

31 Geo. III. c. 46. s. 3. Rescuing an offender ordered to hard labour in houses of correction, or penitentiary houses.

558, Line 24, Add—The 31 Geo. III. c. 46. s. 3. Enacts that if any person shall rescue any offender, ordered to hard labour, in any of the places of confinement used as houses of correction or penitentiary houses, either during his conveyance to the place of con-

(*e*) See this section more at large, *ante*, 538, 539.

finement, or whilst such offenders shall be in the custody of the person or persons under whose care or charge he shall be confined; or if any person shall be aiding or assisting in any such rescue, every such offence shall be punished as under 19 Geo. III. c. 74. s. 66; namely, shall be guilty of felony, and may be ordered to hard labour for any term not less than one nor exceeding five years. The fourth section adopts the provisions of the 19 Geo. III. c. 74. s. 67. as to the prosecution for such rescue; and enacts that the copy of the certificate, in that act mentioned, shall be sufficient evidence of the conviction, &c. of the person rescued. (*f*)

564.—The 31 Geo. III. c. 46. s. 3. enacts, that if any person shall, by supplying arms, tools, instruments, or means of disguise or otherwise, in any manner aid or assist any offender, ordered to hard labour in places of confinement, used as houses of correction or penitentiary houses, in any escape or in any attempt to make any escape, though no escape be actually made; such offence shall be punished as under the statute 19 Geo. III. c. 74. s. 66.; namely, the offender shall be guilty of felony. (*g*)

31 Geo. III. c. 46. Aiding or assisting an offender to escape from houses of correction, or penitentiary houses.

565, Line 5, Add—In 6 Ev. Col. Stat. Pt. V. Cl. xxv. (G) p. 852, 853, the learned editor says, that the earliest act which imposed the punishment of transporta-

(*f*) See this section more at large, *ante*, 538, 539.

(*g*) There is a punishment mentioned in a subsequent part of the section 66 of the statute 19 Geo. III. c. 74. of fine or imprisonment, or both, at the discretion of the court; but that seems to apply only to the misdemeanor of negligently permitting an escape, which is also subsequently mentioned in the same section. *Qu.* also, whether the fourth section of the statute 31 Geo. III. c. 46. which adopts the provisions of the 19 Geo. III. c. 74. s. 67. as to prosecutions for escapes, attempts to escape, breaches of prison, and rescues; and as to a copy of the certi-

tion, is 39 Eliz. c. 4. "For the punishment of "rogues, vagabonds, and sturdy beggars:" by which it is provided that rogues, &c. may, by the justices in sessions, be banished out of the realm, and conveyed, at the charges of the county, to such parts beyond seas as shall be assigned by the privy council, or otherwise adjudged perpetually to the gallies of this realm; and if any rogue so banished shall again return into the realm, he shall be guilty of felony; which felony shall be determined in the county in which the offender is apprehended. And he also says that the earliest subsisting statute, of which he is aware, which notices the power of transportation, is 22 Car. II. c. 5.

570, Note (*n*) add—And sections 65, 66, and 67, relating to the prosecution and punishment of persons breaking prison or escaping, and of persons rescuing offenders or assisting them to escape, are incorporated by reference in stat. 31 Geo. III. c. 46.—See *ante*, 538, 552, 558, 564.

653, Note (*l*) instead of post, Chap. II. *read* post, Chap. III.

1104, line 20, after the word receive, add, "such root, shrub, "or plant, roots, shrubs or plants, of the value "aforesaid."

Felonies on navigations may be prosecuted in any county through which the navigation passes.

1151, line 11, after the word asportation, (*y*) add the late statute 59 Geo. III. c. 27, "That in any indictment for "any felony committed on board any barge, boat, "trow, or other vessel whatever, employed or "used in carrying or conveying goods, wares, "and merchandize, or in which any such goods, "wares, or merchandize shall be, in or upon any

ficate delivered by the clerk of assize being sufficient evidence of conviction, &c. in such cases, extends those provisions also to prosecutions for *aiding or assisting* an escape, or attempt to escape.

" canal, navigable river, or inland navigation,
" in any part of the kingdom of *Great Britain*
" *and Ireland*, it shall be sufficient to allege that
" such felony was committed within any county
" or city through any part whereof such boat,
" barge, trow, or other vessel shall have passed in
" the course of the voyage or journey during
" which such felony shall have been committed;
" and in cases wherein the sides or banks of any
" navigable river, canal, or inland navigation, or
" the centre thereof, shall constitute the boun-
" dary of any two counties or cities, it shall be
" sufficient to allege that such felony was commit-
" ted in either of the said counties or cities through
" which, or any part thereof, such boat, barge,
" trow, or other vessel, shall have passed in the
" course of the voyage or journey during which
" such felony shall have been committed; any and
" every such felony shall and may be inquired of,
" tried, and determined in the county or city
" within which the same felony shall be so al-
" leged to have been committed; and all and
" every person and persons who shall be convicted
" of any such felony as to be inquired of, tried,
" and determined, as aforesaid, shall be subject
" and liable to all such pains of death, and other
" pains, penalties, and forfeitures, as such person
" and persons convicted of such felony would have
" been subject and liable to in case such felony
" had been inquired of, tried, and determined
" in the county in which the same felony was
" actually committed; any law, statute, or usage
" to the contrary in any wise notwithstanding:
" Provided always, that nothing herein contained
" shall extend, or be construed to extend, to affect
" the jurisdiction of the High Court of Admiralty,
" or of any commission for the trial of offences
" under 28 H. VIII. c. 15."

Persons so tried and convicted to be subject to like pains and penalties as if tried in the county where fact was committed.

1309, Note (*u*) add—And this doctrine has been established in a

late case by the decision of the twelve Judges. Gaze's case. East. T. 1819.

1441, Note, (*p*) Instead of 1 East. P. C. c. 2. s. 25. p. 86. *read* 2 East. P. C. c. 19. s. 33. p. 921.

1529, line 2. add—And the 54 Geo. III. c. 70. which was passed for the further improvement of the land revenue of the Crown, makes it a capital offence (by s. 38,) to forge any transfers of funds by that act directed to be sold, &c. or any receipts, warrants, &c. for dividends, monies, &c. under any of the provisions of that act.

*** It may be useful to mention that the edition of Hawkins's Pleas of the Crown, referred to in this Work, is that of the year 1795; and the edition of Leach's cases in Crown Law, that of the year 1815.

A

TREATISE

ON

CRIMES

AND

MISDEMEANORS.

BOOK THE FIRST.

OF PERSONS CAPABLE OF COMMITTING CRIMES, OF PRINCIPALS AND ACCESSORIES, AND OF INDICTABLE OFFENCES.

CHAPTER THE FIRST.

Of Persons capable of committing Crimes.

IT is a general rule that no person shall be excused from punishment for disobedience to the laws of the country, excepting such as are expressly defined and exempted by the laws themselves (*a*). The inquiry, therefore, as to what persons are capable of committing crimes, will best be disposed of by considering the several pleas and excuses by which a person who has committed a forbidden act may be exempted from punishment.

(*a*) 4 Blac. Com. 20.

Want or defect of *will*.

Those pleas and excuses must be founded upon the want or defect of *will* in the party by whom the act has been committed. For without the consent of the *will*, human actions cannot be considered as culpable; nor, where there is no will to commit an offence, is there any just reason why a party should incur the penalties of a law made for the punishment of crimes and offences (*b*). The cases of want or defect of will seem to be reducible to four heads:—I. Infancy—II. Non compos mentis—III. Subjection to the power of others—IV. Ignorance.

Infants committing misdemeanors.

I. The full age of man or woman by the law of England is twenty-one years (*c*): under which age a person is termed *an infant*, and is exempted from punishment in some cases of misdemeanors and offences that are not capital (*d*). But the nature of the offence will make differences which should be observed. Thus, if it be any notorious breach of the peace, as a riot, battery, or the like, an infant above the age of fourteen is equally liable to suffer as a person of the full age of twenty-one (*e*); and if an infant judicially perjure himself in point of age, or otherwise, he shall be punished for the perjury; and he may be indicted for cheating with false dice, &c. (*f*): but if the offence charged by the indictment be a mere non-feazance (unless it be of such a thing as the party be bound to by reason of tenure or the like, as to repair a bridge, &c.) there, in some cases, he shall be privileged by his non-age, if under twenty-one, though above fourteen years; because laches in such a case shall not be imputed to him (*g*).

It is said, that if an infant of the age of eighteen years be convicted of a disseisin with force, yet he shall not be im-

(*b*) 1 Hale 14.

(*c*) It is the full age of male or female according to common speech. Lit. s. 104. 259.

(*d*) 1 Hale 20.

(*e*) 4 Blac. Com. 23. 1 Hale 20. Co. Lit. 246, b. 2 Inst. 703.

(*f*) 3 Bac. Abr. 593. Sid. 253.

(*g*) 1 Hale 20. 3 Bac. Abr. 591.

prisoned (*h*); and the law seems to be, that though an infant at the age of eighteen, or even fourteen, by his own acts, may be guilty of a forcible entry, and may be fined for the same; yet he cannot be imprisoned, because his infancy is an excuse by reason of his indiscretion, and it is not particularly mentioned in the statute against forcible entries, that he shall be committed for such fine (*i*). But an infant cannot be guilty of a forcible entry or disseisin by barely commanding one, or by assenting to one to his use; because every such command or assent by a person under such incapacity is void; but an actual entry by an infant into another's freehold gains the possession and makes him a disseisor (*k*).

Infants committing capital crimes.

With regard to capital crimes the law is more minute and circumspect, distinguishing with greater nicety the several degrees of age and discretion: though the capacity of doing ill, or contracting guilt, is not so much measured by years and days, as by the strength of the delinquent's understanding and judgment (*l*). But within the age of *seven years* an infant cannot be punished for any capital offence; whatever circumstances of a mischievous discretion may appear; for ex presumptione juris such an infant cannot have discretion; and against this presumption no averment shall be admitted (*m*).

On the attainment of *fourteen years* of age, the criminal

(*h*) 1 Hale 21.

(*i*) 4 Bac. Abr. 591. Dalt. 302. Co. Lit. 357. And see 1 Hawk. P. C. c. 64. s. 35. that the infant ought not to be imprisoned because he shall not be subject to corporal punishment by force of the general words of any statute wherein he is not expressly named.

(*k*) 4 Bac. Abr. 591. Co. Lit. 357. 1 Hawk. P. C. c. 64. s. 35.

(*l*) 4 Blac. Com. 23.

(*m*) 1 Hale 27, 28. 1 Hawk. c. 1. s. 1. note (1). 4 Blac. Com. 23. Yet there is a precedent in the register, *fol.* 309, *b.* of a pardon granted to an infant within the age of seven years who was indicted for homicide; the jury having found that he did the fact before he was seven years old.

actions of infants are subject to the same modes of construction as those of the rest of society; for the law presumes them at those years to be *doli capaces*, and able to discern between good and evil, and therefore subjects them to capital punishments as much as if they were of full age (*n*). But during the interval *between fourteen years and seven*, an infant shall be primâ facie deemed to be doli incapax, and presumed to be unacquainted with guilt; yet this presumption will diminish with the advance of the offender's years, and will depend upon the particular facts and circumstances of his case. The evidence of malice, however, which is to supply age, should be strong and clear beyond all doubt and contradiction: but if it appear to the Court and jury that the offender was doli capax, and could discern between good and evil, he may be convicted and suffer death (*o*). Thus it is said, that an infant of eight years old may be guilty of murder, and shall be hanged for it (*p*): and where an infant between eight and nine years was indicted, and found guilty of burning two barns, and it appeared upon examination that he had malice, revenge, craft, and cunning, he had judgment to be hanged, and was executed accordingly (*q*).

An infant, of the age of nine years, having killed an infant of the like age, confessed the felony; and, upon examina-

(*n*) Dr. and Stu. c. 26. Co. Lit. 79. 171. 247. Dalt. 476. 505. 1 Hale 25. 3 Bac. Abr. 581.

(*o*) 1 Hale 25, 27. 4 Blac. Com. 23. The civil law, as to capital punishments, distinguished the ages into four ranks:—1. *Ætas pubertatis plena*, which is eighteen years. 2. *Ætas pubertatis*, or *pubertas* generally, which is fourteen years, at which time persons were likewise presumed to be doli capaces. 3. *Ætas pubertati proxima*; but in this the Roman lawyers were divided, some assigning it to ten years and a half, others to eleven; before which the party was not presumed to be doli capax. 4. *Infantia*, which lasts till seven years; within which age there can be no guilt of a capital offence. 1 Hale 17, 18, 19.

(*p*) Dalt. Just. c. 147.

(*q*) Dean's case, MS. Report, 1 Hale 25. note (*u*).

tion, it was found that he hid the blood and the body: the justices held that he ought to be hanged; but they respited the execution, that he might get a pardon (*r*). Another infant, of the age of ten years, who had killed his companion and hid himself, was, however, actually hanged; upon the ground that it appeared by his hiding that he could discern between good and evil; and *malitia supplet ætatem* (*s*). And a girl of thirteen has been burnt, for killing her mistress (*t*).

In the case of *rape*, the law presumes that an infant under the age of fourteen years is unable to commit the crime; and therefore it seems he cannot be guilty of it: but this is upon the ground of impotency rather than the want of discretion. For he may be a principal in the second degree, as aiding and assisting in this offence as well as in other felonies, if it appear by sufficient circumstances that he had a mischievous discretion (*u*).

The following is an important case as to the capability of an infant of ten years old being guilty of the crime of murder; and as to the expediency of visiting such an offender with capital punishment.

Case of murder by a boy of ten years old.

At Bury summer assizes 1748, William York, a boy of ten years of age, was convicted before Lord Chief Justice Willes, for the murder of a girl of about five years of age, and received sentence of death; but the chief justice, out of regard to the tender years of the prisoner, respited execution, till he should have an opportunity of taking the opinion of the rest of the judges, whether it was proper to execute him or not, upon the special circumstances of the case; which he reported to the judges at Serjeant's Inn in Michaelmas term following.

(*r*) 1 Hale 27. F. *Corone*, 57. B. *Corone*, 133.

(*s*) Spigurnal's case, 1 Hale 26. Fitz. Rep. *Corone*, 118.

(*t*) Alice de Waldborough's case, 1 Hale 26.

(*u*) 1 Hale 630.

The boy and girl were parish children, put under the care of a parishioner, at whose house they were lodged and maintained. On the day the murder happened, the man of the house and his wife went out to their work early in the morning, and left the children in bed together: when they returned from work, the girl was missing; and the boy being asked what was become of her, answered that he had helped her up and put on her cloaths, and that she was gone he knew not whither. Upon this, strict search was made in the ditches and pools of water near the house, from an apprehension that the child might have fallen into the water. During this search, the man, under whose care the children were, observed, that a heap of dung near the house had been newly turned up; and upon removing the upper part of the heap, he found the body of the child about a foot's depth under the surface, cut and mangled in a most barbarous and horrid manner. Upon this discovery, the boy, who was the only person capable of committing the fact that was left at home with the child, was charged with the fact, which he stiffly denied. When the Coroner's jury met, the boy was again charged, but persisted still to deny the fact. At length, being closely interrogated, he fell to crying, and said he would tell the whole truth. He then said, that the child had been used to foul herself in bed; that she did so that morning (which was not true, for the bed was searched and found to be clean); that thereupon he took her out of the bed, and carried her to the dung heap; and with a large knife, which he found about the house, cut her in the manner the body appeared to be mangled, and buried her in the dung heap; placing the dung and straw that was bloody under the body, and covering it up with what was clean; and having so done, he got water and washed himself as clean as he could. The boy was the next morning carried before a neighbouring justice of the peace, before whom he repeated his confession, with all the circumstances he had related to the coroner and his jury. The justice of the peace very prudently deferred proceeding to a commitment, until the boy should have an opportunity of recollecting

himself. Accordingly he warned him of the danger he was in if he should be thought guilty of the fact he stood charged with, and admonished him not to wrong himself: and then ordered him into a room, where none of the crowd that attended should have access to him. When the boy had been some hours in this room, where victuals and drink were provided for him, he was brought a second time before the justice; and then he repeated his former confession: upon which he was committed to gaol.

On the trial, evidence was given of the declarations before mentioned to have been made before the coroner and his jury, and before the justice of the peace; and of many declarations to the same purpose which the boy made to other people after he came to gaol, and even down to the day of his trial; for he constantly told the same story in substance, commonly adding that the devil put him upon committing the fact. Upon this evidence, with some other circumstances tending to corroborate the confessions, he was convicted.

Upon this report of the chief justice, the judges, having taken time to consider of it, unanimously agreed, 1. That the declarations stated in the report were evidence proper to be left to the jury. 2. That supposing the boy to have been guilty of this fact, there were so many circumstances stated in the report, which were undoubtedly tokens of what Lord Hale calls *a mischievous discretion*, that he was certainly a proper subject for capital punishment, and ought to suffer; for it would be of very dangerous consequence to have it thought, that children may commit such atrocious crimes with impunity. That there are many crimes of the most heinous nature, such as in the present case the murder of young children, poisoning parents or masters, burning houses, &c. which children are very capable of committing; and which they may in some circumstances be under strong temptations to commit; and therefore though the taking away the life of a boy of ten years old might savour of

cruelty, yet as the example of that boy's punishment might be a means of deterring other children from the like offences; and as the sparing the boy, *merely on account of his age*, would probably have a quite contrary tendency, in justice to the public, the law ought to take its course; unless there remained any doubt touching his guilt. In this general principle all the judges concurred: but two or three of them, out of great tenderness and caution, advised the chief justice to send another reprieve for the prisoner; suggesting that it might possibly appear on farther inquiry, that the boy had taken this matter upon himself at the instigation of some person or other, who hoped by this artifice to screen the real offender from justice.

Accordingly the chief justice granted one or two more reprieves; and desired the justice of the peace who took the boy's examination, and also some other persons, in whose prudence he could confide, to make the strictest inquiry they could into the affair, and report to him. At length he, receiving no farther light, determined to send no more reprieves, and to leave the prisoner to the justice of the law at the expiration of the last; but, before the expiration of that reprieve, execution was respited till farther order, by warrant from one of the Secretaries of state: and at the summer assizes 1757 the prisoner had the benefit of his Majesty's pardon, upon condition of his entering immediately into the sea service (*w*).

How far statutes extend to cases of infancy.

An act making a new felony, extends not to an infant under the age of discretion, namely, fourteen years old (*x*); and general statutes that give corporal punishment, are not to extend to infants; and therefore if an infant be convicted in ravishment of ward, he shall not be imprisoned, though the statute of Merton, c. 6. be general in that case (*y*).

(*w*) York's case, Fost. 70, *et sequ.*

(*x*) 1 Hale 706. Eyston and Stud's case, Plowd. Com. 465. a.

(*y*) 3 Bac. Abr. 592. Plowd. 364. 1 Hale 21.

But this must be understood, where the corporal punishment is, as it were, but collateral to the offence, and not the direct intention of the proceeding against the infant for his misdemeanor; in many cases of which kind the infant under the age of 21 shall be spared, though possibly the punishment be enacted by parliament (*z*).

But where a fact is made felony or treason, it extends as well to infants, if above fourteen years, as to others. And this appears by several acts of parliament, as by 1 Jac. I. c. 2. of felony for marrying two wives, in which there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, though within the age of 21 years, it is not exempted from the penalty. So by the statute 21 H. VIII. c. 7. concerning felony by servants that embezzle their master's goods delivered to them, there is a special provision that it shall not extend to servants under the age of 18 years, who certainly had been within the penalty, if above the age of discretion, namely 14 years, though under 18 years, unless there had been a special provision to exclude them. And so by the 12 Anne, c. 7. (by which it is made felony without benefit of clergy to steal goods to the value of 40*s*. out of an house though the house be not broken open) where apprentices who shall rob their masters are excepted out of the act (*a*).

Of delaying execution where an infant is convicted.

In many cases of crimes committed by infants, the judges will in prudence respite the execution in order to get a pardon: and it is said that if an infant apparently wanting discretion be indicted and found guilty of felony, the justices themselves may dismiss him without a pardon (*b*). But this authority to dismiss him, must be understood of a reprieve before judgment; or of a case where the jury find

(*z*) 3 Bac. Abr. 591. 1 Hale 21. 147. 1 Hale 21, 22.
(*a*) 3 Bac. Abr. 592. Co. Lit. (*b*) 35 Hen. VI. 11 and 12.

the prisoner within the age of seven years, or not of sufficient discretion to judge between good and evil (*c*).

Of persons non compos mentis.

II. It has been considered, that there are four kinds of persons who may be said to be *non compos*: 1. An idiot. 2. One made non compos by sickness. 3. A lunatic. 4. One that is drunk (*d*).

Idiots.

An *idiot* is a fool or madman from his nativity, and one who never has any lucid intervals: and such an one is described as a person that cannot number twenty, tell the days of the week, does not know his father or mother, his own age, &c.: but these are mentioned as instances only; for whether idiot or not is a question of fact for the jury (*e*). One who is *surdus et mutus à nativitate*, is in presumption of law an idiot, and the rather because he has no possibility to understand what is forbidden by law to be done, or under what penalties: but if it appear that he has the use of understanding, which many of that condition discover by signs, to a very great measure, then he may be tried, and suffer judgment and execution; though great caution should be used in such a proceeding (*f*).

A person made *non compos mentis* by sickness, or, as it has

(*c*) 1 Hale 27. 1 Hawk. P. C. c. 1. s. 8. And Qu. Whether in any case of an infant *convicted* by a jury, the judge would take upon himself to dismiss him. It is submitted that the regular course would be to respite execution, and recommend the prisoner for a pardon.

(*d*) Co. Lit. 247. Beverley's case, 4 Co. 124.

(*e*) 3 Bac. Abr. 526. Dy. 25. Moor, 4 pl. 12. Bro. Idiot 1. F. N. B. 233.

(*f*) 1 Hale 34. And see the note (*o*) where it is said that according to 43 Assis. pl. 30, and 8 Hen. IV. 2, if a prisoner stands mute, it shall be enquired whether it be wilful, or by the act of God; from whence Crompton infers that if it be by the act of God, the party shall not suffer. Crompt. Just. 29, a. But if one who is both deaf and dumb, may discover by signs that he hath the use of understanding; much more may one who is only dumb, and consequently such a one may be guilty of felony; *sed quære* how he shall be arraigned.

been sometimes expressed, a person afflicted with *dementia accidentalis vel adventitia*, is excused in criminal cases from such acts as are committed while under the influence of his disorder (*g*). Several causes have been assigned for this disorder; such as the distemper of the humours of the body; the violence of a disease, as fever or palsy; or the concussion or hurt of the brain: and as it is more or less violent, it is distinguishable in kind or degree, from a particular *dementia*, in respect of some particular matters, to a *total alienation* of the mind, or complete madness (*h*). Non compos mentis from sickness.

A *lunatic* is one labouring also under a species of the *dementia accidentalis vel adventitia*, but distinguishable in this, that he is afflicted by his disorder only by certain periods and vicissitudes, having intervals of reason. Such a person during his phrenzy is entitled to the same indulgence as to his acts, and stands in the same degree with one whose disorder is fixed and permanent (*i*). The name of *lunacy* was taken from the influence which the moon was supposed to have in all disorders of the brain; a notion which has been exploded by the sounder philosophy of modern times. Lunatics.

With respect to a person non compos mentis from *drunkenness*, a species of madness which has been termed *dementia affectata*, it is a settled rule, that if the drunkenness be voluntary it cannot excuse a man from the commission of any crime (*k*), but on the contrary must be considered as an aggravation of whatever he does amiss (*l*). Yet if a person, Persons drunk.

It may be observed, that from the humane exertions of many ingenious and able persons, and from the extensive charitable institutions for the instruction of the deaf and dumb, many of those unfortunate people have at the present day a very perfect knowledge of right and wrong.

(*g*) 1 Hale 30. 3 Bac. Abr. 526.

(*h*) 1 Hale 30.

(*i*) 4 Co. 125. Co. Lit. 247. 1 Hale 31.

(*k*) Co. Lit. 247. 1 Hale 32. 1 Hawk. P. C. c. 1. s. 6.

(*l*) 4 Blac. Com. 26. Plowd. 19. Co. Lit. 247. Nam omne crimen ebrietas incendit et detegit. And see also Beverley's case, 4 Co. 125.

by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causes phrenzy, this puts him in the same condition with any other phrenzy, and equally excuses him; also if by one or more such practices an habitual or fixed phrenzy be caused, though this madness was contracted by the vice and will of the party, yet the habitual and fixed phrenzy caused thereby puts the man in the same condition as if it were contracted at first involuntarily (*m*).

Idiocy and lunacy are the prevailing distinctions.

But though this subject of *non compos mentis* may be spun out to a greater length, and branched into several kinds and degrees, yet it appears that the prevailing distinction herein in law is between *idiocy* and *lunacy*; the first, a *fatuity à nativitate*, or *dementia naturalis*, which excuses the party as to his acts; the other, accidental or adventitious madness, which, whether permanent and fixed, or with lucid intervals, goes under the name of *lunacy*, and excuses equally with idiocy as to acts done during the phrenzy (*n*).

Difficulty of the subject.

The great difficulty in cases of this kind is, to determine where a person shall be said to be so far deprived of his sense and memory as not to have any of his actions imputed to him; or where, notwithstanding some defects of this kind, he still appears to have so much reason and understanding as will make him accountable for his actions. Lord Hale, speaking of partial insanity, says, that it is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and that this partial insanity seems not to excuse them in committing of any capital offence. And he says further, "Doubtless "most persons that are felons of themselves and others are "under a degree of partial insanity when they commit these "offences: it is very difficult to define the invisible line that "divides perfect and partial insanity; but it must rest upon

(*m*) 1 Hale 32. (*n*) 3 Bac. Abr. 527. 4 Co. 125.

" circumstances duly to be weighed and considered both by " the judge and jury, lest on the one side there be a kind of " inhumanity towards the defects of human nature, or on " the other side, too great an indulgence given to great " crimes." And he concludes by saying, " the best mea- " sure I can think of is this: such a person as labouring " under melancholy distempers, hath yet ordinarily as great " understanding as ordinarily a child of fourteen years " hath, is such a person as may be guilty of treason or " felony (*o*)."

Cases.

It will be proper to mention some of the cases which have been decided upon this difficult and most important subject.

Lord Ferrers's case—Murder.

In the case of *Lord Ferrers*, who was tried before the House of Lords for murder, it was proved that his lordship was occasionally insane, and incapable from his insanity of knowing what he did, or judging of the consequences of his actions. But the murder was deliberate; and it appeared that when he committed the crime he had capacity sufficient to form a design and know its consequences. It was urged on the part of the prosecution, that complete possession of reason was unnecessary to warrant the judgment of the law, and that it was sufficient if the party had such possession of reason as enabled him to comprehend the nature of his actions, and discriminate between moral good and evil. And he was found guilty and executed (*p*).

Arnold's case.—Shooting at Lord Onslow.

In Arnold's case, who was tried at Kingston before Mr. J. Tracey for maliciously shooting at Lord Onslow, it appeared clearly that the prisoner was, to a certain extent, deranged, and that he had greatly misconceived the conduct of Lord Onslow; but it also appeared that he had formed a regular design, and prepared the proper means for carrying

(*o*) 1 Hale 30. (by Howell) 947.

(*p*) Lord Ferrers's case, 19 St. Tri.

it into effect. Mr. Justice Tracey left the case to the jury, observing that where a person has committed a great offence the exemption of insanity must be very clearly made out before it is allowed; that it is not every kind of idle and frantic humour of a man, or something unaccountable in his actions, which will shew him to be such a madman as is to be exempted from punishment; but that where a man is totally deprived of his understanding and memory, and does not know what he is doing, any more than an infant, a brute, or a wild beast, he will properly be exempted from justice or the punishment of the law (*q*).

Parker's case.—Aiding the king's enemies by entering into the French service.

In Parker's case, who was indicted for aiding the king's enemies, by entering into the French service in time of war between France and this country, the defence of the prisoner was rested upon the ground of insanity; and a witness on his behalf stated, that his general character from a child was that of a person of very weak intellects; so weak that it excited surprize in the neighbourhood when he was accepted for a soldier. But the evidence for the prosecution had shewn the act to have been done with considerable deliberation and possession of reason; and that the prisoner, who was a marine, having been captured by the French and carried into the isle of France, after a confinement of about six weeks, entered voluntarily into the French service, and stated to a captive comrade that it was much more agreeable to be at liberty and have plenty of money than remain confined in a dungeon. The Attorney General replied to this defence of insanity, that before it could have any weight in rebutting a charge so clearly made out, the jury must be properly satisfied that at the time when the crime was committed the prisoner did not really know right from wrong.

(*q*) Arnold's case, MS. Collison on Lunacy, 475. 8 St. Tri. 317. 16 St. Tri. by Howell, 764, 765. The jury found the prisoner guilty; but at Lord Onslow's request he was reprieved and confined in prison 30 years, till he died.

And the jury, after hearing the evidence summed up, without hesitation pronounced the prisoner guilty (*r*).

Bowler's case.—Shooting at a person, and wounding him.

Thomas Bowler was tried at the Old Bailey on the 2d July, 1812, for shooting at and wounding William Burrowes. The defence set up for the prisoner was, insanity occasioned by epilepsy; and it was deposed by the prisoner's housekeeper that he was seized with an epileptic fit on the 9th July, 1811, and was brought home apparently lifeless, since which time she had perceived a great alteration in his conduct and demeanor; that he would frequently rise at nine o'clock in the morning, eat his meat almost raw, and lie on the grass exposed to the rain; and that his spirits were so dejected that it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, deposed, that it was characteristic of insanity occasioned by epilepsy for the patient to imbibe violent antipathies against particular individuals, even his dearest friends, and to have a desire of taking vengeance upon them from causes wholly imaginary, which no persuasion could remove, and that yet the patient might be rational and collected upon every other subject. He had no doubt of the insanity of the prisoner, and said he could not be deceived by assumed appearances. A commission of lunacy was also produced, dated the 17th of June, 1812, and an inquisition taken upon it, whereby the prisoner was found insane, and to have been so from the 30th of March last (*s*).

Mr. Justice Le Blanc, after summing up the evidence, concluded by observing to the jury, that it was for them to determine whether the prisoner, when he committed the offence with which he stood charged, was incapable of distinguishing right from wrong, or under the influence

(*r*) Parker's case, tried by a special commission, in Horsemonger-lane, 11th of February, 1812, for high treason, Collis. 477.

(*s*) The report of this case, in Collison on Lunacy, 673, does not state the day on which the prisoner shot at W. Burrowes.

of any *illusion* in respect of the prosecutor which rendered his mind at the moment insensible of the nature of the act he was about to commit; since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discerning that he was doing a wrong act, he would be amenable to the justice of his country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty (*t*).

Bellingham's case.—Murder.

In Bellingham's case, who was tried for the murder of Mr. Perceval, a part of the prisoner's defence, not urged by himself but by his counsel, was insanity; and upon this part of the case Mansfield, Chief Justice, is reported to have stated to the jury, that in order to support such a defence it ought to be proved by the most distinct and unquestionable evidence that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the atrocious act with which he stood charged, he did not consider that murder was a crime against the laws of God and nature; and that there was no other proof of insanity which would excuse murder, or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady would be, to all intents and purposes, amenable to justice; and that so long as they could distinguish good from evil they would be answerable for their conduct. And that in the species of insanity in which the patient fancies the existence of injury, and seeks an opportunity of gratifying revenge by some hostile act, if such a person be capable in other respects of distinguishing right from wrong,

(*t*) Bowler's case, Old Bailey, 2d July, 1812, Collis. 673, in the note.

there would be no excuse for any act of atrocity which he might commit under this description of derangement (*u*).

Hadfield's case.—Shooting at the king.

James Hadfield was tried in Westminster Hall, in the year 1800, before a special commission, for high treason in shooting at the king, in Drury-lane theatre; and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle, near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God; sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind; and also committed acts of the greatest extravagance; but at other times he appeared to be rational, and discovered no symptom of mental incapacity or disorder. On the 11th of May preceding his commission of the act in question his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and alluding to his child, a boy of eight months old, of whom he was usually remarkably fond, said he was about to dash his brains out against the bed post, and that God had ordered him to do so; and upon his wife screaming, and his friends coming in, he ran into a cupboard and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th of May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine with the

(*u*) Bellingham's case, Old Bailey, 15th May, 1812, Collis. Addend.636.

king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the society of odd fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the Crown, it was proved that he had sat in his place in the theatre nearly three quarters of an hour before the king entered; that at the moment when the audience rose, on his Majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; and when he fired his situation appeared favourable for taking aim, for he was standing upon the second seat from the orchestra in the pit; and he took a deliberate aim, by looking down the barrel, as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that "he knew perfectly "well his life was forfeited; that he was tired of life, and "regretted nothing but the fate of a woman who was his "wife, and would be his wife a few days longer, he sup-"posed." These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that "his plan was to get "rid of it by other means; he did not intend any thing "against the life of the king; he knew the attempt only "would answer his purpose."

The counsel for the prisoner (*w*) in his very able address to the jury, put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for them to be satisfied that the act in question was the immediate unqualified offspring of the disease. And Lord Kenyon held that as the prisoner was deranged immediately before the offence was committed, it

(*w*) The present Lord Erskine, then at the bar.

was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed; yet there being no reason for believing him to have been at that period a rational and accountable being, he ought to be acquitted (*x*).

Application of the rules and principles of the foregoing cases.

The application of the rules and principles laid down in these cases, to each particular case as it may arise, will necessarily in many instances be attended with difficulty: more especially with regard to the true interpretation of the expressions, which state that the prisoner in order to be a proper subject of exemption from punishment, on the ground of insanity, should appear to have been unable "*to distinguish right from wrong*," or to discern "*that he was doing a wrong act*," or should appear to have been "*totally deprived of his understanding and memory;*" as even in Hadfield's case his expressions when apprehended, that "he was tired of life," that "he wanted to get rid of it," and that "he did not intend any thing against the life of the king, but knew that the attempt only would answer his purpose;" seem to shew that he must have been aware that he was doing *a wrong act*, though the degree of its criminality might have been but imperfectly presented to him, through the morbid delusion by which his senses and understanding were affected. But it is clear that idle and frantic humours, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment, who has committed a criminal act. And it seems that though if there be a total permanent want of reason, or if there be a total temporary want of it when the offence was committed, the prisoner will be entitled to an acquittal; yet if there be a partial degree of reason, a

(*x*) Hadfield's case Collis. 480. The verdict of the jury was "Not "Guilty, it appearing to us that he "was under the influence of in- "sanity, when the act was com- "mitted."

competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design, a faculty to distinguish the nature of actions, to discern the difference between moral good and evil; then, upon the fact of the offence proved, the judgment of the law must take place (*y*).

Proceedings with respect to lunatic offenders.

If a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it; because he is not able to plead to it with that advice and caution that he ought. And if after he has pleaded, the prisoner becomes mad, he shall not be tried; as he cannot make his defence. If after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced; and if after judgment he becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of the English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution (*z*).

And by the common law, if it be doubtful whether a criminal, who at his trial is in appearance a lunatic, be such in truth or not, the fact shall be investigated (*a*). And it appears that it may be tried by the jury, who are charged to try the indictment (*b*), by an inquest of office to be returned by the Sheriff of the county wherein the Court sits (*c*), or being a collateral issue, the fact may be pleaded and replied to *ore tenus*, and a venire awarded returnable *instanter*, in the nature of an inquest of office (*d*). And if it be found

(*y*) Per Yorke, Solicitor General in Lord Ferrers's case, 19 Howell's St. Tri. 947, 948. et per Lawrence, J. Rex v. Allen, Stafford Lent Assizes, 1807, MS. And see also upon the subject of insanity, Lord Thurlow's judgment in the Attorney General v. Parnther. 3 Br. Ch. Cas. 441.

(*z*) 4 Blac. Com. 25. 1 Hale 34.

(*a*) 1 Hawk P. C. c. 1. s. 4.

(*b*) 3 Bac. Abr. 528. 1 Hale 33, 35, 36. 1 Hawk. P. C. c. 1. s. 4. Note (5).

(*c*) 1 Hawk. P. C. c. 1. s. 4. 1 And. 107. 1 Sav. 50, 56. 1 Hale 35.

(*d*) Fost. 46. Kel. 13. 1 Lev. 61. 1 Sid. 72. And the proceed-

that the party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute (*e*).

But in case a person in a phrenzy happen by some oversight, or by means of the gaoler, to plead to his indictment, and is put upon his trial, and it appears to the Court upon his trial that he is mad; if there be no colour of evidence to prove him guilty, or if there be pregnant evidence to prove his insanity at the time of the fact committed, it is fit that the trial proceed in order to his acquittal (*f*).

Disposal of persons acquitted on account of insanity.

By a recent statute 39 and 40 Geo. III. c. 94, it is enacted "that in all cases, when it shall be given in evi- "dence upon the trial of any person, charged with treason, "murder, or felony, that such person was insane at the time "of the commission of such offence, and such person shall "be acquitted, the jury shall be required to find specially "whether such person was insane at the time of the com- "mission of such offence, and to declare whether such per- "son was acquitted by them on account of such insanity; "and if they shall find that such person was insane at the "time of the committing such offence, the Court before "whom such trial shall be had, shall order such person to "be kept in strict custody, in such place and in such man- "ner, as to the Court shall seem fit, until his majesty's "pleasure shall be known; and it shall thereupon be lawful "for his majesty to give such order for the safe custody of "such person during his pleasure, in such place and in such "manner as to his majesty shall seem fit."

Disposal of persons found insane upon arraignment;

And by the second section of the same statute, it is enacted, "that if any person indicted for any offence shall "be insane, and shall upon arraignment be found so to be

ing by inquest ex officio is recommended in cases of importance, doubt, or difficulty. 1 Hale 35. Sav. 56. 1 And. 154. See 1 Hawk. P. C. c. 1. s. 4. note (5).

(*e*) 1 Hawk. P. C. c. 1. s. 4.

(*f*) 3 Bac. Abr. 528. 1 Hale 35, 36.

"by a jury, lawfully impanelled for that purpose, so that "such person cannot be tried upon such indictment; or if
Or, upon trial; "upon the trial of any person so indicted, such person shall "appear to the jury charged with such indictment to be "insane, it shall be lawful for the Court, before whom any "such person shall be brought, to be arraigned or tried as "aforesaid, to direct such finding to be recorded, and "thereupon to order such person to be kept in strict cus- "tody, till his majesty's pleasure shall be known." And it is further enacted, "that if any person charged with any
Or, upon discharge for want of prosecution. "offence, shall be brought before any Court to be dis- "charged for want of prosecution, and such person shall "appear to be insane, it shall be lawful for such Court to "order a jury to be impanelled, to try the sanity of such "person; and if the jury so impanelled shall find such "person to be insane, it shall be lawful for such Court to "order such person to be kept in strict custody, in such "place, and in such manner, as to such Court shall seem fit, "until his majesty's pleasure shall be known." (g)

Persons becoming insane after conviction, and during confinement may be removed to a lunatic asylum.

The 56 Geo. III. c. 117. reciting that it was expedient that provision should be made for the due care of persons who might, *after conviction* for any criminal offence, become insane, enacts that if any person, having been duly convicted for any offence, after such conviction, and during imprisonment or continuance in any gaol, prison, hulk, &c. under sentence of transportation or imprisonment, shall become insane, and it shall be duly certified by two physicians or surgeons that such person is insane, one of the principal secretaries of state may direct, by warrant under his hand, that such person shall be removed to a lunatic asylum or

(g) The third section of the statute contains a provision for the commitment of persons as dangerous and suspected to be insane. And see 17 Geo. II. c. 5, as to the restraint and removal of lunatics by order of two justices; and 48 Geo. III. c. 96, for several provisions which are thereby made for the better care and maintenance of lunatics, being paupers or criminals in custody under 39 & 40 Geo. III. c. 94.

other proper receptacle for insane persons. And it is provided, that such person shall be kept there until it shall be certified by two physicians or surgeons that he has become of sound mind; upon which the said secretary of state may, in case such person is still subject to imprisonment, by his warrant, direct him to be removed back to the gaol, prison, hulk, &c. or if the period of his imprisonment be expired, may direct him to be discharged.

Subjection to the power of others.

III. Persons are properly excused from those acts, which are not done of their own free will, but *in subjection to the power of others* (*h*). Thus though a legislator establish iniquity by a law, and command the subject to do an act contrary to religion and sound morality; yet obedience to such laws, while in being, is a sufficient extenuation of civil guilt before the municipal tribunal; though a different decree will be pronounced in *foro conscientiæ* (*i*). As to persons in *private relations*, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct, is with regard to the matrimonial subjection of the *wife* to her husband; for neither a *child* nor a *servant* are excused the commission of any crime, whether capital or not capital, by the command or coercion of the parent or master (*k*).

Feme Covert under the coercion of her husband.

But a *feme covert* is so much favoured in respect of that power and authority which her husband has over her, that she shall not suffer any punishment for committing a bare theft, or even a burglary, by the coercion of her husband, or in his company, which the law construes a coercion (*l*). But this is only the presumption of law; so that if upon the evidence it can clearly appear that the wife was not drawn to the offence by her husband, but that she was the principal

(*h*) 1 Hale 43. 4 Blac. Com. 27.
(*i*) 4 Blac. Com. 27.
(*k*) 1 Hale 44, 516. 1 Hawk. P. C. c. 1. s. 14. Moor. 813. 3 Kel. 34.
(*l*) 1 Hale 45. 1 Hawk. P. C. c. 1. s. 9. 4 Blac. Com. 28. Kel. 31.

inciter of it, she is guilty as well as the husband. And if she be any way guilty of procuring her husband to commit the offence, it seems to make her an accessory before the fact in the same manner as if she had been sole (*m*). And if she commit a theft of her own voluntary act, or by the bare command of her husband, or be guilty of treason, murder, or robbery, in company with, or by coercion of her husband, she is punishable as much as if she were sole (*n*). And she will be guilty in the same manner of all such crimes which, like murder, are *mala in se*, and prohibited by the law of nature (*o*). And in one case it appears to have been held by all the judges, upon an indictment against a married woman, for falsely swearing herself to be next of kin and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath (*p*).

Not answerable for her husband's breach of duty.

But where the wife is to be considered merely as the servant of the husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Charles Squire and his wife were indicted for the murder of a boy, who was bound as a parish apprentice to the prisoner Charles; and it appeared in evidence that both the prisoners had used the apprentice in a most cruel and barbarous manner, and that the wife had occasionally committed the cruelties in the absence of the husband. But the surgeon who opened the body deposed, that in his judgment the boy died from debility and want of proper food and nourishment, and not from the wounds, &c. which he had received. Upon which Lawrence J. directed the jury, that as the wife was the servant of the husband it was not her duty to provide the apprentice with sufficient food and nourishment, and that she was not guilty of any

(*m*) 1 Hale 516. 2 Hawk. P. C. c. 29. s. 34.

(*n*) 1 Hawk. P. C. c. 1. s. 11. 1 Hale 45. 516. Kel. 31. 2 Blac. Com. 29.

(*o*) 4 Blac. Com. 29.

(*p*) Rex *v.* ——— in 1781, 2 MS. Sum. *tit.* Of Offenders.

breach of duty in neglecting to do so; though, if the husband had allowed her sufficient food for the apprentice, and she had wilfully withholden it from him, then she would have been guilty. But that here the fact was otherwise; and therefore, though in foro conscientiæ the wife was equally guilty with her husband, yet in point of law she could not be said to be guilty of not providing the apprentice with sufficient food and nourishment (*q*).

In inferior misdemeanors a wife may be indicted, together with her husband; and she may be punished with him for keeping a bawdy house, for this is an offence as to the government of the house in which the wife has a principal share; and also such an offence as may generally be presumed to be managed by the intrigues of the sex (*r*). But a prosecution for a conspiracy is not maintainable against a husband and wife only; because they are esteemed but as one person in law, and are presumed to have but one will (*s*).

But in some cases a feme covert is responsible for her offence.

In all cases where the wife offends alone without the company or coercion of her husband, she is responsible for her offence as much as any feme sole (*t*). Thus she may be indicted alone for a riot; (*u*) may be convicted of selling gin against the injunctions of the 9 Geo. II. c. 23. (*w*) or for recusancy (*x*). And she may be indicted for being a com-

(*q*) Squire and his wife (case of), *Stafford* Lent Assizes, 1799. MS.

(*r*) 1 Hawk. P. C. c. 1. s. 12. Williams's case, 10 Mod. 63. Salk. 384. S. C. So also for keeping a gaming house. Rex *v.* Dixon and wife, 10 Mod. 335. in which case the indictment was against the husband and wife, *et uterque eorum*.

(*s*) 1 Hawk. P. C. c. 72. s. 8.

(*t*) 4 Blac. Com. 29. But if a wife incur a forfeiture of a penal statute, the husband may be made a party to an action or information for the same, and shall be liable to answer what shall be recovered thereon. 1 Hawk. P. C. c. 1. s. 13.

(*u*) Dalt. 447.

(*w*) Croft's case, Str. 1120. And she may be committed for disobeying an order of bastardy. Rex *v.* Ellen Taylor, 3 Burr. 1679.

(*x*) Hob. 96. Foster's case, 11 Co. 62. 1 Sid. 410. Sav. 25.

mon scold; (*y*) for assault and battery; (*z*) for forestalling; (*a*) for a forcible entry; (*b*) or for keeping a bawdy house, if her husband do not live with her; (*c*) and for trespass or slander. (*d*) And she may also be indicted for receiving stolen goods of her own separate act without the privity of her husband; or if he knowing thereof, leave the house and forsake her company, she alone shall be guilty as accessory; (*e*) and though in a serious offence, such as that of sending threatening letters, the husband be an agent in the transaction, yet if he be so ignorantly, by the artifice of the wife, she alone is punishable. (*f*) And generally a *feme covert* shall answer as much as if she were sole for any offence not capital against the common law or statute; and if it be of such a nature that it may be committed by her alone, without the concurrence of the husband, she may be punished for it without the husband, by way of indictment; which being a proceeding grounded merely on the breach of the law, the husband shall not be included in it for any offence to which he is in no way privy. (*g*)

But she is not guilty of felony in stealing her husband's goods.

But a *feme covert* is not guilty of felony in stealing her husband's goods, because a husband and wife are considered but as one person in law, and the husband, by endowing his wife at the marriage with all his worldly goods, gives her a kind of interest in them: for which cause even a stranger

(*y*) Foxley's case, 6 Mod. 213. 239.

(*z*) Salk. 384.

(*a*) Sid. 110. 2 Keb. 634. *Qu.* and see Bac. Ab. *Baron and feme* (G.) notes.

(*b*) 1 Hale 21. Co. Lit. 357. 1 Hawk. c. 64. s. 35. That is in respect of such actual violence as shall be done by her in person, but not in respect of what shall be done by others at her command, because such command is void.

(*c*) 1 Hawk. P. C. c. 1. s. 13. n. 11. where 1 Bac. Abr. 294. is cited: *sed qu.*

(*d*) 1 Bac. Abr. *Baron and feme*, (G.) notes.

(*e*) 22 Ass. 40. Dalt. 157.

(*f*) Hammond's case, 1 Leach 417.

(*g*) 1 Hawk. P. C. c. 1. s. 13. 1 Bac. Abr. *Baron and feme* (G.) where it is said in the notes, that she cannot be indicted for barratry, and Roll. Rep. 39. is cited.

cannot commit larceny in taking the goods of the husband by the delivery of the wife, as he may by taking away the wife by force and against her will, together with the goods of the husband. (*h*)

And a stranger cannot commit larceny of the husband's goods by the delivery of the wife, unless he is her adulterer.

And in a case where the prisoner was an apprentice to the prosecutor, and it appeared that the prosecutor's wife had continual custody of the key of the closet where her husband's plate was usually locked up, and that she had pawned some articles of it in order to supply the prisoner with pocket money, but the articles she pawned were not those which the prisoner was charged with stealing; and the prisoner confessed that he took the articles mentioned in the indictment from the closet, and a pawnbroker proved that he received them in pledge from the prisoner, but it did not appear by what means the prisoner had gained access to the closet from which they were taken, the prisoner was acquitted. The court held, that the prosecutor's wife, having the constant keeping of the key of the closet where the plate was usually locked up, and it appearing that the prisoner could not have taken it without her *privity or consent*, it might be presumed that he had received it from her. (*i*) But it should be observed, that if the wife steal the goods of her husband and deliver them to B. who knowing it carries them away, *B. being the adulterer of the wife*, this, according to a very good opinion, would be felony in B.; for in such case no consent of the husband can be presumed. (*k*)

(*h*) 1 Hale 514. where it is put thus: "If she take or steal the "goods of her husband and deli- "ver them to B., who, knowing it, "carries them away, this seems no "felony in B.; for they are taken "*quasi* by the consent of her hus- "band. Yet trespass lies against B. "for such taking; for it is a tres- "pass; but *in favorem vitæ* it shall "not be adjudged a felony, and so "I take the law to be, notwith- "standing the various opinions." And he cites Dalton, cap. 104. p. 268, 269. *ex lecturâ Cooke* (new ed. c. 157. p. 504.) And see 1 Hawk. P. C. c. 33. s. 32. 3 Inst. 110. 2 East P. C. 558.

(*i*) Harrison's case, 1 Leach 47. 2 East P. C. 559.

(*k*) Dalton, cap. 104. pl. 268, 269. (new edit. c. 157. p. 504.)

Feme covert not accessory for receiving her husband.

A *feme covert* shall not be deemed accessory to a felony for receiving her husband who has been guilty of it, as her husband shall be for receiving her; nor shall be a principal in receiving her husband when his offence is treason; for she is *sub potestate viri*, and bound to receive him. (*l*) Neither is she affected by receiving, jointly with her husband, any other offender. (*m*)

Ignorance.

IV. Upon the plea or excuse of ignorance, it may be shortly observed, that it will apply only to ignorance or mistake of fact, and not to any error in point of law. For ignorance of the municipal law of the kingdom is not allowed to excuse any one that is of the age of discretion, and compos mentis, from its penalties when broken; on the ground that every such person is bound to know the law, and presumed to have that knowledge. (*n*) But in some instances an ignorance or mistake of the fact will excuse; which appears to have been ruled in cases of misfortune and casualty; as if a man, intending to kill a thief or house-breaker in his own house, by mistake kills one of his own family, this will not be a criminal action. (*o*)

(*l*) 1 Hale 47. 1 Hawk. P. C. c. 1. s. 10.

(*m*) 1 Hale 48. 621. But if the wife alone, the husband being ignorant, do knowingly receive B. a felon, the wife is accessary and not the husband. 1 Hale 621.

(*n*) 1 Hale 42. 4 Blac. Com. 27. *Ignorantia juris, quod quisque tenetur scire, neminem excusat*, is a maxim as well of our own law as it was of the Roman. Plowd. 343. Ff. 22. 6. 9.

(*o*) Levett's case, Cro. Car. 538. 4 Blac. Com. 27. 1 Hale 42, 43.

CHAPTER THE SECOND.

Of Principals and Accessories.

WHERE two or more are to be brought to justice for one and the same felony, they are considered in the light either, I. of principals in the first degree; II. principals in the second degree; III. accessories before the fact; or, IV. accessories after the fact. And in either of these characters they will be *felons* in consideration of law; for he who takes any part in a felony, whether it be a felony at common law or by statute, is in construction of law a felon, according to the share which he takes in the crime. (*a*)

Principals in the first degree.

I. Principals in the first degree are those who have *actually and with their own hands committed the fact;* but it does not appear necessary to say any thing in this place by way of explanation of the nature of their guilt, which will be detailed in treating of the different offences in the course of the work.

Principals in the second degree.

II. Principals in the second degree are those who were *present aiding and abetting* at the commission of the fact. They are generally termed *aiders and abettors*, and sometimes accomplices; but the latter appellation will not serve as a term of definition, as it includes all the *participes criminis*, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact. (*b*) The distinction be-

(*a*) Fost. 417. (*b*) Fost. 341

tween principals in the first, and principals in the second degree; or, to speak more properly, the course and order of proceeding against offenders founded upon that distinction, appears to have been unknown to the most ancient writers on our law; who considered the persons present aiding and abetting in no other light than as *accessories at the fact.* (*c*) But as such accessories they were not liable to be brought to trial till the principal offenders should be convicted or outlawed; a rule productive of much mischief, as the course of justice was frequently arrested by the death or escape of the principal, or from his remaining unknown or concealed. And with a view to obviate this mischief the judges by degrees adopted a different rule; and at length it became settled law that all those who are present aiding and abetting when a felony is committed are principals in the second degree. (*d*)

How far a principal in the second degree must be present at the time of the fact committed.

In order to render a person a principal in the second degree, or an aider and abettor, he must be *present aiding and abetting* at the fact, or ready to afford assistance if necessary; but the *presence* need not to be a strict actual immediate presence, such a presence as would make him an eye or ear witness of what passes. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent a surprize, or to favour, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same in-

(*c*) Fost. 347.

(*d*) Coal-heavers' case, 1 Leach 66. And see Fost. 428. This law was by no means settled till after the time of Edw. III.; and so late as the first of Queen Mary a chief justice of England strongly doubted of it, though indeed it had been sufficiently settled before that time

stant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to ensure the success of their common enterprize. (*e*)

It has been held, that to aid and assist a person to, the jurors unknown to obtain money by the practice of *ring dropping* is felony, if the jury find that the prisoner was confederating with the person unknown to obtain the money by means of this practice. (*f*)

Murder by several in prosecution of some unlawful purpose.

If a fact amounting to murder should be committed *in prosecution of some unlawful purpose*, though it were but a bare trespass, all persons who had gone in order to give assistance if need were, for carrying such unlawful purpose into execution, would be guilty of murder. But this will apply only to a case where the murder was committed *in prosecution of some unlawful purpose*, some common design in which the combining parties were united, and for the effecting whereof they had assembled; for unless this shall appear, though the person giving the mortal blow may himself be guilty of murder, or manslaughter, yet the others who came together for a different purpose will not be involved in his guilt. (*g*) Thus where three soldiers went together to rob an orchard; two got upon a pear-tree, and the third stood at the gate with a drawn sword in his hand; and the owner's son coming by collared the man at the gate, and asked him what business he had there, whereupon the soldier stabbed him; it was ruled to be murder in the man who stabbed, but that those on the tree were innocent. It was considered that they came to commit a small inconsiderable trespass, and that the man was killed upon a sudden affray without their knowledge. But the decision would have been otherwise if they had all come thither with a

(*e*) Fost. 350. 2 Hawk. P. C. c. 29. s. 7, 8.

(*f*) Moore's case, 1 Leach 314.

(*g*) Fost. 351, 352. 2 Hawk. P. C. c. 29. s. 7.

general resolution against all opposers; for then the murder would have been committed in prosecution of their original purpose. (*h*)

Or where there is a general resolution against all opposers.

For where there is *a general resolution against all opposers*, whether such resolution appears upon evidence to have been actually and explicitly entered into by the confederates, or may be reasonably collected from their number, arms, or behaviour, at or before the scene of action, and homicide is committed by any of the party, every person present in the sense of the law when the homicide is committed will be involved in the guilt of him that gave the mortal blow. (*i*)

But where the purpose was lawful it will be murder only in the party killing and his actual aiders and abettors.

But it must be observed that this doctrine respecting the whole party being involved in the guilt of one or more, will apply only to such assemblies as are formed for carrying some common purpose *unlawful in itself* into execution. For if the original intention was lawful, and prosecuted by lawful means, and opposition is made by others, and one of the opposing party is killed in the struggle, in that case the person actually killing may be guilty of murder or man-

(*h*) Fost. 353. Case at Sarum Lent Assizes, 1697, MS. *Denton* and *Chapple*. 2 Hawk. P. C. c. 29. s. 9. And see Hodgson and others (case of) 1 Leach 6. And an *Anon.* case at the Old Bailey, in December sessions, 1664. 1 Leach 7. note (a) where several soldiers, who were employed by the messengers of the Secretary of State to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be; and having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony in all; and Holt, C. J. citing the case, says, "That they were "all engaged in an unlawful act is "plain, for they could not justify "breaking a man's house without "making a demand first; yet all "those who were not guilty of the "stealing were acquitted, notwithstanding their being engaged in "one unlawful act of breaking the "door; for this reason, because "they knew not of any such intent, but it was a chance opportunity of stealing, whereupon "some of them did lay hands."

(*i*) Fost. 353, 354. 2 Hawk. P. C. c. 29. s. 8.

slaughter, as circumstances may vary the case; but the persons engaged with him will not be involved in his guilt, *unless they actually aided or abetted him in the fact;* for they assembled for another purpose which was lawful, and consequently the guilt of the person actually killing cannot by any fiction of law be carried against them beyond their original intention. (*k*)

As to the punishment of aiders and abettors:

When the rule was first settled that aiders and abettors should be deemed principals in the second degree, and not accessories *at* the fact, the object in view was probably to bring such offenders more speedily and certainly to their trial; (*l*) without any intention of enhancing the measure of their punishment upon conviction. Nor would the consequence of an increased punishment have immediately followed from the rule, as the distinction between principals and accessories did not at that time affect the life of the party upon conviction: and all were then alike liable to suffer death, from the principal in the first degree to the accessory in the lowest, unless the privilege of clergy, which in those days was founded solely on the clerical function or capacity of the delinquent, interposed. Whether principals or accessories, therefore, the punishment would have been capital to those who were not entitled to the privilege of clergy; and to those who were entitled, the punishment would not have been capital, though principals in the highest degree. But in later times the question of principal or accessory has become a matter of the greatest importance to the prisoner; in many cases life or death to him; for by wiser regulations the allowance or non-allowance of clergy no longer depends upon the function and capacity of the offender, but upon the nature of the offence; and is extended, in cases in which it is allowable, to all ranks and orders of men. (*m*)

(*k*) Fost. 354, 355. 2 Hawk. P. C. c. 29. s. 9. And see further upon this point, *post*, Book III. Chap. 3. on *Homicide*.

(*l*) Ante, p. 30.

(*m*) 3 & 4 Will. and Mary, c. 9.

Whether liable to be punished as principals in the first degree:

Now it being admitted as a settled rule that aiders and abettors are to some purposes at least principals in the second degree, it has been made a question whether they ought to be so considered to all purposes and in all cases; and especially with regard to new felonies created by statutes which take away clergy from those who shall be guilty in such manner and under such circumstances as are therein particularly set forth, without express mention of aiders and abettors, or any words which manifestly extend to them: whether aiders and abettors also shall be ousted of their clergy in the construction of such statutes. The point is very ably and elaborately argued by Mr. Justice Foster, who thinks that if a departure from the ancient rule had in such cases affected the prisoner's life upon conviction, the judges would still have adhered to it, notwithstanding the mischiefs by which it was attended. (*n*)

Grounds for considering them as not so liable.

It is allowed on all hands that aiders and abettors have been always ousted of their clergy, and properly so, by the construction of the statutes which oust clergy in murder, robbery, rape, and burglary. (*o*) But then it is said that the legislature in these statutes has made use of terms which at the time when the acts were made, and long before, were well known to include aiders and abettors; that in these statutes clergy is taken away from the several offences described by legal technical terms of well-known signification; namely, *murder*, *robbery*, *rape*, and *burglary*; and that the objects of these acts are persons *convicted* of murder, robbery, rape, and burglary; aiders and abettors being, at the time these statutes were made, clearly liable to be convicted as principals in those offences. Whereas in many other statutes aiders and abettors are not once named, *nor de-*

s. 6. 5 Ann. c. 6. s. 4. Vide Post. 350.

(*n*) See Mr. Justice Foster's arguments, Post. 355 to 360. and 416 to 430.

(*o*) 1 Hale 537. 2 Hale 359. Post. 357. The statutes are, 1 Ed. VI. c. 12. s. 10. as to murder and robbery; and 18 Eliz. c. 7. as to rape and burglary.

scribed by any terms importing that the legislature intended to oust them. (*p*)

It certainly appears that in general the judges have been extremely tender in the construction of statutes which take away clergy; and have in several instances carefully distinguished between the cases of principals in the first and second degrees, the actual perpetrators, and mere aiders and abettors. Thus in a case upon the statute of stabbing, which enacts, "that every person which shall stab or "thrust," &c. (*q*) two persons were present aiding and abetting a third person, who in fact made the thrust, and was denied his clergy; and these persons, though agreed to have been principals in manslaughter at common law, were admitted to their clergy; for it was considered that though in judgment of law every one present and aiding is a principal, yet in construction of this statute, which is so penal, it shall be extended only to such as really and actually made the thrust; not to those who in construction of law only may be said to make it. (*r*) So in a case upon the statute 39 Eliz. c. 15. against robbery *in* dwelling houses, (*s*) where two persons put a ladder against a chamber window, one of them opened the window, got into the chamber, and stole 40*l*., but the other stood on the ladder in the view of him who entered, saw him in the chamber, assisted in the robbery, and had a share of the booty, but *did not enter the chamber;* it was held that as *he did not enter* he should have his clergy, though plainly a principal aiding and abet-

(*p*) Fost. 357, 358.

(*q*) 1 Jac. I. c. 8.

(*r*) Page and Harwood's case, Fost. 355. Aleyn 43. Str. 86. 1 Hale 468. And the case of the Queen *v.* Whistler, Salk. 542. 2 Lord Raym. 842.

(*s*) The enactment of the statute is, "that if any person shall be "convicted for the felonious tak- "ing away in the day time of any "money, goods, or chattels, being "of the value of 5*s*. or upwards, "*in* any dwelling-house or houses, "or any part thereof, or any out- "house, &c. although no person "be in the said house, &c. at the "time of such felony committed," he shall be excluded the benefit of clergy.

ting. (*t*) And the same rule of construction has been held to govern in the case of larceny, *clam et secreté a personâ* upon the statute 8 Eliz. c. 4. (*u*) where the person who actually picked the pocket was held to be ousted of his clergy, but not he who was present aiding and abetting; though without some accomplice ready at hand to take off the booty, this sort of theft could seldom have succeeded. (*w*)

Upon the two first of these cases Mr. Justice Foster makes the following remarks:—"Why did not a constructive "thrust in one case and a constructive entry in the other ope- "rate so as to oust the accomplices present and abetting of "clergy? The reason is plain, and hath been already hinted "at; the judges were upon the construction of statutes very "penal, which were to be taken literally and strictly; aiders "and abettors are not named or described, and therefore could "not, as they conceived, be brought within the statutes." (*x*) And Mr. Justice Foster cites the following passage from Lord Hale as seeming to favour the construction for which he contends:—"An act that makes an offence by name, as rape, "&c. to be felony, virtually makes all that are present "aiding and assisting principals, though one only doth the "fact. Though as to the point of clergy in some cases it "differs;" (*y*) and he thinks that the difference which Lord

(*t*) Evans and Finch (case of) Cro. Car. 473. Hale, in citing this case, says that the offence must be a stealing *in* the house; and therefore he that steals, or is party to the stealing, being out of the house, is not ousted of his clergy. The law stood thus with regard to this statute, and also to the 5th and 6th Edw. VI. c. 9. against an offence of the like kind, till by 3 and 4 W. and M. c. 9. aiders and abettors were expressly ousted.

(*u*) By which it is enacted, "that "no person indicted for the fe- "lonious taking of any money, "goods, or chattels from the per- "son of any other, privily without "his knowledge, shall have benefit "of clergy." This act is repealed by 48 Geo. III. c. 129.

(*w*) 1 Hale 529. Baynes and others (case of), 1 Leach 7. Murphy Mary and Bridget (case of), 1 Leach 266. Sterne's case, 1 Leach 473.

(*x*) Fost. 357.

(*y*) 1 Hale 704.

Hale hints at must arise from the different penning of the several acts. (*z*)

But some of the points insisted upon by Mr. Justice Foster, in his able argument, will probably appear to rest upon grounds rather too subtle and refined; particularly his distinction between the phrase "person so offending," in the statute 9 Geo. I. c. 22. and "person offending in any such offence," in 25 Hen. VIII. c. 6. (*a*) And it appears that a great majority of the judges differed with him upon this subject. It is stated, that they gave great weight to the construction which had been constantly put on acts of parliament touching high treason, and on those which take away clergy from murder, robbery, rape, and burglary; aiders and abettors, though not named in the statutes, having always been brought within the compass of them to all intents, and suffered accordingly. (*b*) And contrary to his opinion they decided upon the 9th Geo. I. c. 22. (by which it is enacted, that "if any person shall unlawfully and maliciously kill, maim, or wound any cattle, every person *so offending*, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in cases of felony, without benefit of clergy") that an aider and abettor was ousted of his clergy. (*c*) And in a subsequent case, called the Coal-heavers' case, seven men were convicted and executed on the same statute, 9 Geo. I. c. 22, (*d*) which takes away clergy in express terms only from those who maliciously shoot at another person, *three of them not having discharged a gun or pistol.* The judges determined that this offence was a new created felony; and therefore that it must necessarily possess all the incidents which appertain to felony by the rules and principles of the common law; that the statute does not merely take away the privi-

Grounds for considering them as so liable.

(*z*) Fost. 417, 418.

(*a*) Revived by 5 Eliz. c. 17. See Fost. 417. and 422, 423.

(*b*) Fost. 421.

(*c*) Midwinter and Sims (case of), Fost. Append. 415. 1 Leach 66. Note (*a*). See also Dodson's Life of Foster, 30. 35.

(*d*) Commonly called The Black Act.

lege of clergy from an offence which was before known, but ordains that those *who are guilty* (*e*) of the thing prohibited by it shall be adjudged felons without benefit of clergy; and therefore by a necessary implication makes all the procurers and abettors of it principals or accessories upon the same circumstances which would make them such in a felony by the common law; and that it had been long settled that all those who are present aiding and abetting when a felony is committed, are principals in the second degree. (*f*)

Mr. Justice Blackstone's opinion.

It should be observed, however, that Mr. Justice Blackstone, in his excellent work, adopts, to a great extent, the distinctions endeavoured to be established by Mr. Justice Foster, and lays down the following rules. That when the benefit of clergy is taken away from the *offence*, (as in case of murder, buggery, robbery, rape, and burglary) a principal in the second degree, being present aiding and abetting the crime, is as well excluded from his clergy as he that is principal in the first degree; but that where it is only taken away from the *person committing* the offence (as in the case of stabbing, or committing larceny in a dwelling house, or privately from the person,) his aiders and abettors are not excluded, through the tenderness of the law, which has determined that such statutes shall be taken literally. (*g*)

Of accessories before the fact.

III. *An accessory before the fact* is he who, being absent at the time of the offence committed, doth yet procure, counsel, command or abet another to commit a felony. (*h*) And it seems that those who by hire, command, counsel, or conspiracy, and those who by shewing an express liking, approbation, or assent to another's felonious design of committing a felony, abet and encourage him to commit it, but are so far absent when he actually commits it that he could

(*e*) The words are, "every person so offending."

(*f*) Coal-heavers' case, 1 Leach 66.

(*g*) 4 Blac. Com. 373. citing 1 Hale 529. Fost. 356, 357.

(*h*) 1 Hale 615.

not be encouraged by the hopes of any immediate help or assistance from them, are accessories before the fact. But words that amount to bare permission will not make an accessory; as if A. says he will kill J. S. and B. says "you may do your pleasure for me," this will not make B. an accessory. (*i*) And it seems to be generally agreed that he who barely conceals a felony which he knows to be intended is guilty only of misprision of felony, and shall not be adjudged an accessory. (*k*) The same person may be a principal and an accessory in the same felony, as where A. commands B. to kill C. and afterwards actually joins with him in the fact. (*l*)

Offence of accessory before the fact differs from that of principal in the second degree.

The offence of an accessory before the fact differs so much from that of a principal in the second degree, that where a person was indicted as an accessory before the fact, it was held that she could not be convicted of that charge upon evidence proving her to have been present aiding and abetting; it being clearly admitted to be necessary to charge a principal in the second degree with being *present* aiding and abetting. (*m*)

(*i*) 2 Hawk. P. C. c. 29. s. 16.

(*k*) 1 Hale 616. 2 Hawk. P. C. c. 29. s. 23.

(*l*) 2 Hawk. P. C. c. 29. s. 1. where it is said also that he may be charged as principal and accessory in the same indictment; but *qu.* if this would be allowed at the present day. In Atkins's case, who was tried for the murder of Sir E. Godfrey, two indictments were found against him, one as principal, the other as accessory; and he was arraigned upon both at the same time. But the first was abandoned, and evidence given only in support of the second: the verdicts appear, however, to have been pronounced successively. 7 Howell's St. Tri. 231.

(*m*) Gordon Winifred and Thomas (case of), 1 Leach 515. S. C. 1 East. P. C. 352. And see Haydon's case, 4 Co. 42. b. In Gordon's case it was the opinion of all the judges that the prisoner who was discharged upon this objection might be indicted again as principal. So, in 1 Hale 625 it appears, that if one person be indicted as principal and another as accessory, and both be acquitted, yet the person indicted as accessory may be indicted as principal, and the former acquittal as accessory is no bar. But it is said that if a person

Case of Donally and Vaughan.—Objection on behalf of an accessory, that as the jury had acquitted the principal of burglary, and found him guilty only of stealing in the house, they could not find the accessory guilty as accessory to the "*said felony* and burglary;" but that they ought to have acquitted the accessory, as they had negatived the burglary.

John Donally and George Vaughan were tried at the Old Bailey, September sessions, 1816; Donally being indicted for a burglary in the house of a Mr. Poole, and Vaughan as accessory before the fact to the "said felony and burglary." It appeared, that by a previous concert between Donally and Vaughan, and a person named Barrett, Donally accompanied three other men who went to rob Mr. Poole's house, Vaughan and Barrett watching in a passage on the opposite side of the street; and the purpose of Donally, Vaughan, and Barrett clearly being to procure a burglary to be commited by the three other men, and afterwards to apprehend and convict them, in order to get shares of the reward. Mr. Poole's house was robbed; the three men who accompanied Donally were almost immediately apprehended by Vaughan and Barrett, and had been tried at a former sessions at the Old Bailey for burglary; but were convicted only of stealing in the dwelling house to the amount of 40*s.* in consequence of Mr. Poole's evidence as to its being possible, at the time the robbery was committed, to see a person's face by the light of the day.

Upon the present indictment against Donally and Vaughan the jury acquitted Donally of the burglary, but found him guilty of stealing in the dwelling house to the amount of 40*s.* and they found Vaughan guilty as an accessory to the "*said felony* and burglary," the charge stated in the indictment. Upon this finding, *Curwood*, after taking an objection that this could not be larceny in Donally, because not done *animo furandi*, further objected on behalf of the prisoner Vaughan, that as the indictment was against him as accessory to a burglary committed by Donally, and as the jury had acquitted the principal of the burglary, the

be indicted as principal and acquitted, he shall not be indicted as accessory *before*. 1 Hale 626.; yet *qu.* and see Fost. 362. It seems to be admitted, that if a man be indicted as principal and acquitted, he may be indicted as accessary *after*; and so if he be indicted as accessory before, and acquitted, he may be indicted as accessory after. 1 Hale 626.

charge against the accessory must necessarily fail. That the offence of an accessory, though distinct, is yet derivative from that of the principal, and may be considered as the shadow of a substance. That by the reversal of an attainder against a principal the attainder against the accessory, which depends upon the attainder of the principal is, ipso facto, utterly defeated and annulled. (*n*) And that though the charge against the accessory in this indictment, of which the jury had found him guilty, is as accessory to the "said *felony* and burglary," yet that the word felony, as thus used, is only descriptive of the character of the burglary, and by no means applies to any other or different offence. That in an indictment against an accessory to a murder, the charge would be laid against him as accessory to the "said "felony and murder," but would not import two crimes, or any other crime than that which the law denominates murder. That upon the whole, therefore, the charge against Vaughan could only be considered as a charge of being accessory to a supposed *burglary* by Donally; and that as the jury had negatived such burglary, they ought consequently to have acquitted Vaughan. (*o*)

Description of accessories before the fact in different statutes.

It is to be observed that the legislature, in statutes made from time to time concerning accessories before the fact, has not confined itself to any certain mode of expression; but has rather chosen to make use of a variety of words all terminating in the same general idea. Thus some statutes make use of the word accessories, singly, without any words descriptive of the offence: (*p*) others have the words

(*n*) Lord Sanchar's case, 9 Co. 119.

(*o*) Donally and Vaughan (case of) Old Bailey, Sept. Sess. 1816. Mr. Baron Graham respited the judgment, and the objections were argued in the following Michaelmas term in the Exchequer Chamber by Curwood for the prisoners, and Bolland for the crown. The opinion of the judges has not as yet been formally communicated; but it is understood to be unanimous in favour of the objection on behalf of Vaughan, and in the proportion of 10 to 2 in favour of the objection on behalf of Donally. *Ex relat. Curwood*, Easter Term, 1817.

(*p*) 31 Eliz. c. 12. s. 5. 21 Jac. I. c. 6.

abetment, procurement, helping, maintaining, and counselling; (*q*) or aiders, abettors, procurers, and counsellors. (*r*) One describes the offence by the words command, counsel or hire; (*s*) another calls the offenders procurers or accessories. (*t*) One having made use of the words comfort, aid, abet, assist, counsel, hire, or command, immediately afterwards in describing the same offence in another case uses the words counsel, hire, or command only. (*u*) One statute calls them counsellors and contrivers of felonies; (*w*) and many others make use of the terms counsellors, aiders, and abettors, or barely aiders and abettors. Upon these different modes of expression, all plainly descriptive of the same offence, Mr. Justice Foster thinks it may safely be concluded that in the construction of statutes which oust clergy in the case of *participes criminis*, we are not to be governed by the bare sound, but by the true legal import of the words; and also that every person who comes within the description of these statutes, various as they are in point of expression, is in the judgment of the legislature an accessory before the fact; unless he is present at the fact, and in that case he is undoubtedly a principal. (*x*)

Accessories by the intervention of a third person.

Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact; for there is nothing in the notion of commanding, hiring, counselling, aiding, or abetting, which may

(*q*) 23 Hen. VIII. c. 1. s. 3.

(*r*) 1 Ed. VI. c. 12. s. 13.

(*s*) 4 & 5 Ph. & M. c. 4.

(*t*) 39 Eliz. c. 9. s. 2.

(*u*) 3 & 4 W. & M. c. 9.

(*w*) 1 Anne st. 2. c. 9.

(*x*) That is, a principal in the first degree if the actual perpetrator, or a principal in the second degree if only an aider and abettor. Fost. 131. And see Fost. 130, where speaking of a case in 1 And. 195. in which an indictment was held to be sufficient, though the words of the statute of Ph. & M. were not pursued, the words *excitavit movit* et *procuravit* being deemed tantamount to the words of the statute and descriptive of the same offence, he says that he takes that case to be good law, though he confesses it is the only precedent he has met with where the words of the statute have been totally dropped.

not be effected by the intervention of a third person without any direct immediate connection between the first mover and the actor. It is a principle in law which can never be controverted, that he who procures a felony to be done is a felon. So that if A. bid his servant hire somebody, no matter whom, to murder B. and furnish him with money for that purpose, and the servant procure C. a person whom A. never saw nor heard of to do it, A. who is manifestly the first mover or contriver of the murder is an accessory before the fact. (*y*) And a nobleman was found guilty of murder by his peers upon evidence which satisfied them that he had contributed to the murder by the intervention of his lady and of two other persons who were themselves no more than accessories, without any sort of proof that he had ever conversed with the person who was the only principal in the murder, or had corresponded with him directly by letter or message. (*z*)

In what crimes there may be accessories.

In *high treason* there are no accessories but all are principals, on account of the heinousness of the crime. (*a*) But in *petit treason*, murder, and felonies in general, there may be accessories, except only in those offences which by judgment of law are sudden and unpremeditated, as manslaughter and the like; which therefore cannot have any accessories before the fact. (*b*) In *petit larceny* there can be no accessories either before or after the fact, although it be felony, because it is not such as judgment of death ought by law to be passed upon it; but procurers and counsellors are principals as in trespass. (*c*) In *forgery* it is laid down

(*y*) See the case of Macdaniel, Egan, and Berry. Fost. 125. 2 Hawk. P. C. c. 29. s. 1. 10. St. Tri. 417 (fol. edit.) 19 Howell's St. Tri. 746.

(*z*) The case of the Earl of Somerset indicted as an accessory before the fact to the murder of Sir Thomas Overbury, 1 St. Tri. 335.

(*a*) 2 Hawk. P. C. c. 29. s. 2. 5. 1 Hale 613. Fost. 341. 4 Blac. Com. 35.

(*b*) 4 Blac. Com. 36. 1 Hale 615. 2 Hawk. P. C. c. 29. s. 24.

(*c*) 2 East. P. C. 743. 1 Hale 530, 616. 2 Inst. 183. 12 Rep. 81. Evans's case, Fost. 73. It appears however that in Reddeard's case,

generally in the books that all are principals, and that whatever would make a man accessory before in felony would make him a principal in forgery; (*d*) but it is conceived that this must be understood of forgery at common law, and where it is considered only as a misdemeanor. (*e*) And where three persons agreed to utter a forged bank note, and one uttered it at Gosport, and the other two by previous concert waited at Portsmouth; the two latter were held to be accessories; and having been tried and convicted as principals were recommended for a pardon. (*f*) In *crimes under the degree of felony* there can be no accessories, but all persons concerned therein, if guilty at all, are principals. (*g*)

In felonies created by statute.

It should be observed as to felonies created by acts of parliament, that regularly if an act of parliament enact an offence to be felony, though it mention nothing of accessories before or after, yet virtually and consequentially those that counsel or command the offence are accessories before the fact, and those who knowingly receive the offender are accessories after. (*h*)

E. 11, Ann. (De Grey's MS.) Powell J. said it was a vulgar error to think that petit larceny or any felony, capital or not, might not have accessories after the fact. Serj. Forster's MS. cited 2 East. P. C. 743. But the principle as stated in the text seems well established, and in the case of Evans, (Foster 73), Mr. J. Foster expressly says "Evans ought not to have "been put upon his trial; for the "acts which make receivers of "stolen goods knowingly accessories to the felony, must be understood to make them accessories in such cases only where "by law an accessory may be, and "there can be no accessory to "petty larceny."

(*d*) Bothe's case, Moor 666. 1 Sid. 312. 2 Hawk. c. 29. s. 2. and authorities cited in 2 East. P. C. 973.

(*e*) 2 East. P. C. 973. And see post, Book 4. Chap. on Forgery. And see Morris's case, 2 Leach 1096 note (a).

(*f*) Soares, Atkinson and Brighton (case of) MS. S. C. 2 East. P. C. 974.

(*g*) 4 Blac. Com. 36. 1 Hale 613.

(*h*) 1 Hale 613, 614, 704. 3 Inst. 59.

Accessorius sequitur naturam sui principalis.

It is a maxim that *accessorius sequitur naturam sui principalis;* (*i*) and therefore an accessory cannot be guilty of a higher crime than his principal. So that if a servant instigates a stranger to kill his master, this being murder in the stranger as principal, of course the servant is accessory only to the crime of murder; though had he been present and assisting he would have been guilty as principal of petty treason and the stranger of murder. (*k*) But a statute excluding accessories from the benefit of clergy does not thereby exclude the principals; nor does a statute excluding the principals thereby exclude the accessories. (*l*) And certain accessories after the fact, namely receivers of stolen goods, are in some instances punished with more severity than the principal offenders. (*m*)

How far an accessory is implicated when the principal varies from the terms of the instigation.

It has been occasionally much considered how far an accessory is involved in the guilt of the principal when the principal does not act in conformity with the plans and instructions of the accessory. With regard to this, it appears that *if the principal totally and substantially varies* from the terms of the instigation, if being solicited to commit a felony of one kind, he wilfully and knowingly commit a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. (*n*) Thus if A. command B. to burn C.'s house, and he in so doing commits a robbery; now A. though accessory to the burning is not accessory to the robbery, for that is a thing of a distinct and unconsequential nature. (*o*) But if *the principal complies in substance* with the instigation of the accessory, varying only in circumstance of time or place, or in the manner of execution, the accessory will be involved in his guilt: as if A. command B. to murder C. by poison, and B. does it by a sword or other weapon, or by

(*i*) 3 Inst. 139.

(*k*) 4 Blac. Com. 36.

(*l*) 2 Hawk, P. C. c. 33. s. 26.

(*m*) 4 Geo. I. c. 11. 29 Geo. II. c. 30. s. 1. and 2 Geo. III. c. 28—14 years' transportation.

(*n*) Fost. 369.

(*o*) 1 Hale 617. 4 Blac. Com. 37.

any other means, A. is accessory to this murder; for the murder of C. was the object principally in contemplation, and that is effected. (*p*) So where *the principal goes beyond* the terms of the solicitation, if in the event the felony committed was a probable consequence of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony. As if A. advise B. to rob C., and in robbing him B. kills him, either upon resistance made, or to conceal the fact, or upon any other motive operating at the time of the robbery: or if A. solicit B. to burn the house of C., and B. does it accordingly, and the flames taking hold of the house of D., that likewise is burnt. In these cases A. is accessory to B. both in the murder of C. and in the burning of the house of D. The advice, solicitation, or orders, were pursued in substance, and were extremely flagitious on the part of A.; and the events, though possibly falling out beyond his original intention, were, in the ordinary course of things, the probable consequences of what B. did under the influence and at the instigation of A. (*q*)

A. being counselled to murder B. murders C.

But the more difficult questions arise where the principal *by mistake commits a different crime* from that to which he was solicited by the accessory. It has been said, that if A. orders B. to kill C., and he by mistake kills D., or aiming a blow at C. misses him and kills D., A. will not be accessory to this murder, because it differs in the person. (*r*) And in support of this position Saunders' case (*s*) is cited; who with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it her to eat; and the wife having eaten a small part of it, and having given the remainder to their child, Saunders (making only a faint attempt to save the child whom he loved and would not have destroyed) stood by and saw it eat the

(*p*) Fost. 369, 370. 2 Hawk. P. C. c. 29. s. 20.

(*q*) Fost. 370.

(*r*) 1 Hale 617. 3 Inst. 51.

(*s*) Plowd. 475. 1 Hale 431.

poison, of which it soon afterwards died. And it was held, that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessary to that murder. But Mr. Justice Foster thinks, that this case of Saunders does not support the position (which he calls a merciful opinion) to its full extent; and he proposes the following case as worthy of consideration. "B. is an utter stranger "to the person of C., A. therefore takes upon him to de- "scribe him by his stature, dress, age, complexion, &c. "and acquaints B. when and where he may probably be "met with. B. is punctual at the time and place, and D., "a person possibly in the opinion of B. answering the de- "scription, unhappily comes by and is murdered, upon a "strong belief on the part of B. that this is the man marked "out for destruction. Here is a lamentable mistake; but "who is answerable for it? B. undoubtedly is; the malice "on his part *egreditur personam.* And may not the same be "said on the part of A.? The pit which he, with a mur- "derous intention dug for C., D. *through his guilt*, fell into "and perished. For B. not knowing the person of C., had "no other guide to lead him to his prey than the descrip- "tion A. gave of him. B. in following this guide fell into "a mistake, which it is great odds any man in his circum- "stances might have fallen into. I therefore, as at present "advised, conceive that A. was answerable for the conse- "quence of the flagitious orders he gave, since that conse- "quence appears, in the ordinary course of things, to have "been highly probable." (*t*)

Criteria in such cases.

Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to turn. "Did the prin- "cipal commit the felony he stands charged with under the "influence of the flagitious advice; and was the event, in the "ordinary course of things, a probable consequence of that "felony? or did he, following the suggestions of his own

(*t*) Fost. 370, 371.

"wicked heart, wilfully and knowingly commit a felony of "another kind, or upon a different subject." (*w*)

Accessory repents and countermands the principal.

A. commands B. to kill C., but before the execution thereof repents and countermands B., yet B. proceeds in the execution thereof: A. is not accessory, for his consent continues not, and he gave timely countermand to B.: but if A. had repented, but B. had not been actually countermanded before the fact committed, A. had been accessory. (*x*)

Of accessories after the fact.

IV. *An accessory after the fact*, is a person who, knowing a felony to have been committed by another, receives, relieves, comforts, or assists the felon. (*y*) And it seems to have been agreed, that any assistance given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory of this description: as where one assists a felon with a horse to ride away, or with money or victuals to support him in his escape, or where one harbours and conceals in his house a felon under pursuit, by reason whereof the pursuers cannot find him; and much more where one harbours in his house and openly protects such a felon, by reason whereof the pursuers dare not take him. (*z*) Also whoever rescues a felon from an arrest for the felony, or voluntarily and intentionally suffers him to escape, is an accessory to the felony: (*a*) and it has been said, that those are in like manner guilty who oppose the apprehending of a felon. (*b*) It is agreed by all the books, that a man may be an accessory after the fact, by receiving one who was an accessory before

(*w*) Fost. 372.

(*x*) 1 Hale 617.

(*y*) 1 Hale 618. 4 Blac. Com. 37.

(*z*) 2 Hawk. P. C. c. 29. s. 26. 1 Hale 618, 619. 4 Blac. Com. 38. 5 Ann. c. 31. s. 5.

(*a*) 2 Hawk. P. C. c. 29. s. 27. 1 Hale 619. but not the merely suffering him to escape, where it is a bare omission. 1 Hale 619. 2 Hawk. P. C. c. 29. s. 29.

(*b*) 2 Hawk. P. C. c. 29. s. 27.

as well as by receiving a principal. (*c*) And it has been holden, that a man may make himself an accessory after the fact to a larceny of his own goods, or to a robbery on himself, by harbouring or concealing the thief, or assisting in his escape. (*d*)

In offences created by statute.

Where an act of parliament enacts an offence to be felony, though it mentions nothing of accessories, yet virtually and consequentially those that knowingly receive the offender are accessories *after*. (*e*) It has, however, been said, that if the act of parliament that makes the felony in express terms, comprehend accessories *before*, and make no mention of accessories *after*, it seems there can be no accessories *after*; the expression of procurers, counsellors, abettors, all which import accessories *before*, making it evident that the legislature did not intend to include accessories *after*, whose offence is of a lower degree than that of accessories before. (*f*) But by others it is considered to be settled law, that in all cases where a statute makes any offence treason, or felony, it involves the receiver of the offender in the same guilt with himself, in the same manner as in treason or felony at common law, unless there be an express provision to the contrary. (*g*) And although it be generally true, that an act of parliament creating a felony renders consequentially accessories *before* and *after* within the same penalty, yet the special penning of the act sometimes varies the case: thus, the statute 3. Hen. VII. c. 2. for taking away women, makes the taking away, the procuring and abetting, and also the wittingly receiving, all equally felonies and excluded of clergy. So that acts of parliament may diversify the offences of accessory or principal according to their various penning, and have done so in many cases. (*h*)

The accessory

There is no doubt but that it is necessary for a receiver to

(*c*) 2 Hawk. P. C. c. 29. s. 1.
(*d*) Fost. 123. Cromp. Just. 41 b. pl. 4 and 5.
(*e*) 1 Hale 613.
(*f*) 1 Hale 614.
(*g*) 2 Hawk. P. C. c. 29. s. 14.
(*h*) 1 Hale 614, 615.

must know of the felony committed, and the felony must be complete.

have had notice, either express or implied, of a felony having been committed, in order to make him an accessory by receiving the felon; (*i*) and it is also agreed, that the felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. So that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent; this does not make him accessory to the homicide, for till death ensues there is no felony committed. (*k*)

Feme covert.

The law has such a regard to the duty, love, and tenderness, which a wife owes to her husband, that it does not make her an accessory to felony, by any receipt whatever which she may give to him; considering that she ought not to discover her husband. (*l*)

Prosecutions against accessories after the fact at common law not frequent.

It is not thought necessary to discuss further the general principles of law relating to accessories after the fact, since prosecutions against such persons grounded on the common law are seldom instituted at the present time; nor do they appear to have been frequent for many years past, nor to have had any great effect. (*m*) With respect to *receivers of stolen goods*, who by the 3 and 4 W. and M. c. 9. and by the 5 Anne, c. 31, are made accessories after the fact, it is intended to treat of their offence in a subsequent chapter. (*n*) It may be observed, however, that the statute 5 Anne, c. 31. s. 5. enacts, that if any person shall receive, harbour, or conceal, any burglars, felons, or thieves, knowing them to be so, he shall be taken as an accessory to the felony. (*o*) And in the case of horse-stealing, a statute of Elizabeth (*p*) has

(*i*) 2 Hawk. P. C. c. 29. s. 32.

(*k*) 2 Hawk. c. 29. s. 35. 4 Blac. Com. 38.

(*l*) 2 Hawk. c. 29. s. 34. 1 Hale 621. *ante*, p. 28. But this applies to no other relation besides that of a wife to her husband: and the husband may be an accessory for the receipt of his wife. 1 Hale 621.

(*m*) Fost. 372.

(*n*) *Post*, Book IV. Chap. XIII. on *Receiving stolen Goods.*

(*o*) *Vid.* 2 East. P. C. 744. as to the construction of this statute.

(*p*) 31 Eliz. c. 12. s. 5.

taken away clergy as well from the accessory after as before the fact. But this statute extends only to such persons as were in judgment of law accessories at the time the act was made, namely, accessories at common law; not to such as are made accessories by subsequent statutes; and therefore a person knowingly receiving a stolen horse, who is made an accessory by later statutes, is not ousted. (*q*)

Of the proceedings against accessories.

The principal and accessory may be indicted in the same indictment and tried together, which is the best and most usual course: (*r*) and the accessory shall not, without his own consent, be brought to trial, till the guilt of the principal is legally ascertained by conviction or outlawry, unless they are tried together. (*s*) This, however, must be understood, with the exception of those accessories after the fact, commonly called receivers of stolen goods, who, by the enactments of several statutes, (*t*) may be proceeded against by indictment for a misdemeanor, though the principal may not have been convicted; as will be shewn more at length in a subsequent chapter. (*u*) Where the proceedings are against the accessory only, the name of the principal should be stated in the indictment, if it is known; and where it

(*q*) Fost. 373. citing MSS. Tracy and Denton.

(*r*) 1 Hale 623. Fost. 365. Donally and Vaughan (case of) Old Bailey, Sept. 1816, *ante*, p. 40. It seems to be settled at this day, that if the principal and accessory appear together, and the principal plead the general issue, the accessory shall be put to plead also, and that if he likewise plead the general issue, both may be tried by one inquest; but that the principal must be first convicted, and that the jury shall be charged, that if they find the principal not guilty, they shall find the accessory not guilty. But it seems agreed, that if the principal plead a plea in bar, or abatement, or a former acquittal, the accessory shall not be forced to answer till that plea be determined; for if it be found for the principal the accessory is discharged; if against the principal, yet he shall afterwards plead over to the felony, and may be acquitted. 2 Hawk. P. C. c. 29. s. 47. 1 Hale 624.

(*s*) 1 Hale 623. 2 Hawk. c. 29. s. 45. Fost. 360.

(*t*) 1 Anne, sess. 2. c. 9. s. 2. 5 Anne, c. 31. s. 6. 22 Geo. III. c. 58.

(*u*) *Post*, Book IV. Chap. XIII. on *Receiving stolen Goods*.

was stated in an indictment against an accessory to a felony, that the felony was committed by a person to the jurors unknown, and it appeared that the principal felon was a witness before the grand jury, it was held that the indictment could not be supported. (*w*)

A man may be arraigned as accessory to such of the principals as are convicted.

Formerly if a man had been indicted as accessory in the same felony to several persons, he could not have been arraigned till all the principals were convicted and attainted; but as the law now stands, if a man be indicted as accessory to two or more, and the jury find him accessory to one, it is a good verdict, and judgment may pass upon him. (*x*) And therefore the Court in their discretion may arraign him as accessory to such of the principals as are convicted; and if he be found guilty as accessory to them or any of them, judgment shall pass upon him. (*y*) An acquittal in such case would not formerly have discharged him as accessory to the others; (*z*) but by the statute 43 Geo. III. c. 113. s. 5. it is provided that no person shall be tried more than once for the same offence of being accessory *before* the fact.

Former acquittal when a bar to a fresh indictment.

If A. be indicted as principal, and B. as accessory, and both be acquitted, or if B. only be acquitted, yet B. may be indicted as principal in the same offence, and his former acquittal is no bar. (*a*) But it seems to be agreed, that if A. be indicted as principal and acquitted, he cannot be afterwards indicted as accessory before the fact. (*b*) If, however, a man be indicted as principal and acquitted, he may be indicted as

(*w*) Rex *v.* Walker, 3 Campb. 264. So in an indictment for larceny, though the goods may be laid to be the property of *persons unknown*, such an allegation is improper if the owner be really known. 2 East. P. C. 651. 781. *Post*, Book IV. Chap. IV. on *Larceny*.

(*x*) Fost. 361. 9 Co. 119.

(*y*) 1 Hale 624. 2 Hawk. P. C. c. 29. s. 46. Plowd. 98, 99. Fost. 361.

(*z*) 2 Hawk. P. C. c. 29. s. 46.

(*a*) 1 Hale 625. Gordon Winifred and Thomas (case of), 1 Leach 515. S. C. 1 East. P. C. 35.

(*b*) 1 Hale 626. 2 Hale 244. But Mr. Justice Foster says, that he knows not upon what grounds, as in consideration of law the offences of principal and accessory are quite different. See Fost. 361, 362.

accessory *after* the fact; and so if he be indicted as accessory *before* the fact and acquitted, he may be indicted as accessory *after* the fact. (*c*)

Accessory may be tried where the principal offender has been convicted, &c. though not *attainted*.

Anciently an accessory could not be tried, unless the principal were attainted: so that if the principal stood mute of malice, or challenged peremptorily above the legal number of jurors, or refused to answer directly to the charge, the accessory could not have been put upon his trial. (*d*) But the statute 1 Anne, stat. 2. c. 9. provides a remedy for this defect, and enacts, that "if any principal offender shall "be convicted of any felony, or shall stand mute, or pe- "remptorily challenge above the number of twenty persons "returned to serve of the jury, it shall and may be lawful "to proceed against any accessory, either before or after "the fact, in the same manner *as if such principal felon had* "*been attainted* thereof, notwithstanding any such principal "felon shall be admitted to the benefit of his clergy, par- "doned, or otherwise delivered before attainder; and every "such accessory shall suffer the same punishment, if he or "she be convicted, or shall stand mute, or peremptorily "challenge above the number of twenty persons returned "to serve of the jury, as he or she should have suffered if "the principal had been attainted." Upon this statute it has been held that it is sufficient, in an indictment for felony against a receiver of stolen goods, to state that the principal was "*tried and duly convicted*," without going on to shew that *judgment* was passed upon him, or how he was delivered. (*e*) And where an indictment for receiving stolen goods averred that the principal felon had been *duly convicted*, upon an objection that the record which was pro-

(*c*) 1 Hale 626.

(*d*) Fost. 362, where the doctrine is reprobated: and see 1 Hale 625, where it is said that it was for this reason that *Weston*, the principal actor in the murder of *Sir Thomas Overbury*, could not for a long while be prevailed upon to plead, that so the Earl and Countess of *Somerset*, who were the movers and procurers, might escape, 1 St. Tri. 314.

(*e*) Hyman's case, 2 Leach 925. 2 East. P. C. 782.

duced was not sufficiently formal and correct to support the averment, it was held that the *judgment* was not necessary, and might be rejected; that the *conviction was sufficient;* that in the common case, where the receiver is tried with the thief, there is no judgment on the thief before the verdict against the receiver; and that although the record produced was full of errors, yet an erroneous attainder of the principal is sufficient, as against the accessory, until it is reversed. (*f*)

The accessory may controvert the guilt of the principal.

Where the principal and accessory are tried together upon the same indictment, there is no doubt but that the accessory may enter into the full defence of the principal, and avail himself of every matter of fact and every point of law tending to his acquittal; for the accessory is in this case to be considered as *particeps in lite;* and this sort of defence necessarily and directly tends to his own acquittal. And where the accessory is brought to his trial after the conviction of the principal, and it comes out in evidence upon the trial of the accessory that the offence of which the principal was convicted *did not amount to felony in him, or not to that species of felony with which he was*

(*f*) Baldwin's case, 3 Campb. 265. Cor. Thomson B. *Monmouth* Summer assizes, 1812. The judgment was very informal, concluding "and the said Isaac Powell in "*mercy*, &c." See further as to the sufficiency of an erroneous attainder of the principal while unreversed. 1 Hawk. P. C. c. 29. s. 40. And see in Lord Sanchar's case, 9 Co 119, that if the principal is erroneously attainted yet the accessory shall be attainted: for the attainder against the principal stands till it is reversed. And by Lawrence J. in Holmes v. Walsh, 7 T. R. 465, "The judgment upon "an indictment must be taken to "be good until it is reversed by a "writ of error; as in the case of "proceedings against the accessory. So if there be a judgment "against the husband for treason "not reversed by error, it is sufficient to deprive the wife of her "dower." And see 1 Hale 625. But by the reversal of an attainder against a principal, the attainder against the accessory, which depends upon the attainder of the principal, is *ipso facto* utterly defeated and annulled. Lord Sanchar's case, 9 Co. 119. Fost. 366.

charged, the accessory may avail himself of this, and ought to be acquitted. (*g*) For though it is not necessary upon such trial on the part of the prosecution to enter into a detail of the evidence on which the conviction was founded, and the record of the conviction is deemed sufficient evidence against the accessory to put him upon his defence; yet the presumption raised by the record that every thing in the former proceeding was rightly and properly transacted must, it is conceived, give way to facts manifestly and clearly proved; and that as against the accessory the conviction of the principal will not be conclusive; being as to him *res inter alios acta*. (*h*) This was the opinion of Mr. Justice Foster; and upon this opinion the court, in a case at the *Old Bailey*, permitted the counsel for a prisoner indicted as an accessory to controvert the propriety of the conviction of the principal by *vivâ voce* testimony, and to shew that the act done by the principal did not amount to a *felony*, and was only *a breach of trust*. (*i*) And in a later case in the same court it was also admitted that the record of the conviction of the principal was not *conclusive* evidence of the felony against the accessory, and that he has a right to controvert the propriety of such conviction. (*k*)

But how far an accessory can avail himself *in point of fact*, by shewing that the principal was *totally innocent*, is a question of more difficulty, and should be handled with great caution; because facts for the most part depend upon the credit of witnesses: and when the strength and hinge of a cause happen to be disclosed, as they may be, by one trial, daily experience convinces us that witnesses for very bad purposes may be too easily procured. Upon this point, however, Mr. Justice Foster cites some authorities, which he apprehends to be strong, to shew that the accessory may

(*g*) Fost. 365.
(*h*) *Ibid.*
(*i*) Smith's case, 1 Leach 288.
(*k*) Prosser's case, mentioned in a note to Smith's case, 1 Leach 290. *Cor.* Gould J. who is considered to have been a very accurate crown lawyer.

insist upon the *innocence of the principal;* and then gives his own opinion. He says "if it shall manifestly appear, in "the course of the accessory's trial, that in point of fact "the principal was innocent, common justice seems to re- "quire that the accessory should be acquitted. A. is con- "victed upon circumstantial evidence, strong as that sort "of evidence can be, of the murder of B.; C. is afterwards "indicted as accessory to this murder; and it comes out "upon the trial, by incontestible evidence, that B. is still "living. (Lord Hale somewhere mentions a case of this "kind) Is C. to be convicted or acquitted? The case is "too plain to admit of a doubt. Or suppose B. to have "been in fact murdered, and that it should come out in "evidence, to the satisfaction of the court and jury, that the "witnesses against A. were mistaken in his person, (a case "of this kind I have known) and that A. was not nor could "possibly have been present at the murder." (*l*)

In what county they shall be tried.

Where a person is feloniously stricken or poisoned in one county, and dies thereof in another county, the accessory may be indicted in the county where the death shall happen. (*m*)

And where a murder or felony was committed in one county, and the person was accessory in another county, the accessory may be indicted in the county where he was accessory. And the judges of assize, or two of them, of the county where the offence of the accessory shall have been committed, on suit to them made, shall write to the keeper of the records where the principal shall have been convicted to certify them whether such principal be attainted, convicted, or otherwise discharged, which he shall certify under his seal. (*n*)

(*l*) Fost. 367, 368, and see 3 Esp. R. 134 (in the case of Cook *v.* Field) where it was stated by Bearcroft, and assented to by Lord Kenyon, that where the principal has been convicted, it is nevertheless on the trial of the accessory competent to the defendant to prove the principal innocent.

(*m*) 2 & 3 Ed. VI. c. 24. s. 2, 3.

(*n*) 2 & 3 Ed. VI. c. 24. s. 4. Lord Sanchar's case, 9 Co. 117, where several questions were moved upon this statute.

In the case of accessories to any felony *before* the fact, whether the principal felony be committed within the body of any county or upon the high seas, and whether the procuring, &c. or abetting, or otherwise becoming accessories before the fact be committed within the body of any county or upon the high seas, the offence of such accessories may be tried (in case the principal felony was committed within the body of any county) by the course of the common law, either within the county where the principal felony was committed, or in the county where the offence of becoming accessory before the fact was committed; and in case the principal felony was committed upon the high seas, then the offence of becoming accessory before the fact may be tried in such court, &c. as is directed by the statute 28 Hen. VIII. c. 15, for trying felonies committed upon the high seas. (*o*)

The 33 Hen. VIII. c. 23, intituled "An act to proceed "by commission of oyer and terminer against such persons "as shall confess treason, &c. without remanding the same "to be tried in the shire where the offence was commit-"ted," (*p*) gives certain powers for making commissions of *oyer* and *terminer* for the speedy trial of persons examined before the king's council, or three of them, upon any murders or other offences therein mentioned under such circumstances and in such cases as in the said act are mentioned; but no provision is therein made for the trial of accessories *before* the fact in murder: it is therefore provided by the statute 43 Geo. III. c. 113. s. 6. that the powers and authorities of the former statute shall be extended to the offence of procuring, &c. or otherwise becoming an accessory *before* the fact to any murder. (*q*)

(*o*) 43 Geo. III. c. 113. s. 5.

(*p*) 1 East's P. C. 369.

(*q*) By s. 7, this act is not to extend to Ireland.

CHAPTER THE THIRD.

Of Indictable Offences.

OFFENCES which may be made the subject of indictment, and are below the crime of treason, may be divided into two classes, *felonies* and *misdemeanors*.

Felony defined.

The term *felony* has long been used to signify the actual crime committed; and not, as it did originally, the penal consequence of forfeiture occasioned by the crime: and the only adequate definition of it is stated by an excellent writer to be this, namely, an offence which occasions a total forfeiture of either lands or goods, or both, at the common law; and to which capital or other punishment *may be* superadded according to the degree of guilt. (*a*) Capital punishment does by no means enter into the true definition of felony; but the idea of felony is so generally connected with that of capital punishment, that it is hard to separate them, and to this usage the interpretations of the law have long conformed. Therefore if a statute makes any new offence felony, the law implies that it shall be punished with death as well as with forfeiture, unless the offender prays the benefit of clergy, which all felons are entitled once to have, unless the same is expressly taken away by statute. (*b*)

What words in a statute create a felony.

With regard to felonies created *by statute*, it seems clear that not only those crimes which are made felonies in ex-

(*a*) 4 Blac. Com. 95. Et vide 1 Hawk. C. 25 s. 1

(*b*) 4 Blac. Com. 98.

press words, but also all those which are decreed to have or undergo judgment of life and member by any statute become felonies thereby, whether the word "*felony*" be omitted or mentioned. (*c*) And where a statute declares that the offender shall, under the particular circumstances, be deemed to have *feloniously* committed the act, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (*d*) But an offence shall never be made felony by the construction of any doubtful and ambiguous words of a statute; and therefore, if it be prohibited under "pain of forfeiting all that a man "has," or of "forfeiting body and goods," or of being "at the king's will for body, land, and goods," it shall amount to no more than a high misdemeanor. (*e*) And though a statute make the doing of an act *felonious*, yet if a subsequent statute make it *penal* only, the latter statute is considered as a virtual repeal of the former, so far as relates to the punishment of the offence. (*f*) And it should also be observed, that where a statute makes a second offence felony, or subject to a heavier punishment than the first, it is always implied that such second offence ought to be committed after a conviction for the first; from whence it follows, that if it be not so laid in the indictment it shall be punished but as the first offence: for the gentler method shall first be tried, which perhaps may prove effectual. (*g*) Where a statute makes an offence felony which was before only a misdemeanor, an indictment will not lie for it as a misdemeanor. (*h*)

Misdemeanors described.

The word *misdemeanor*, in its usual acceptation, is applied to all those crimes and offences for which the law has not provided a particular name; and they may be punished, according to the degree of the offence, by fine or imprison-

(*c*) 1 Hawk. P. C. c. 40. s. 2.

(*d*) By Bayley J. in Johnson's case, 3 M. and S. 556.

(*e*) 1 Hawk. P. C. c. 40. s. 3.

(*f*) 1 Hawk. P. C. c. 40. s. 5.

(*g*) 1 Hawk. P. C. c. 40. s. 4.

(*h*) Rex *v.* Cross, 1 Lord Raym. 711. 3 Salk. 193.

ment, or both. (*i*) A misdemeanor is, in truth, any crime less than a felony; and the word is generally used in contradistinction to felony; misdemeanors comprehending all indictable offences which do not amount to felony, as perjury, battery, libels, conspiracies, and public nuisances. (*k*) Misdemeanors have been sometimes termed *misprisions:* indeed, the word misprision, in its larger sense, is used to signify every considerable misdemeanor which has not a certain name given to it in the law; and it is said that a misprision is contained in every treason or felony whatsoever, and that one who is guilty of felony or treason may be proceeded against for a misprision only, if the king please. (*l*) But generally *misprision of felony* is taken for a concealment of felony, or a procuring the concealment thereof, whether it be felony by the common law, or by statute; (*m*) and silently to observe the commission of a felony, without using any endeavours to apprehend the offender, is a misprision; a man being bound to discover the crime of another to a magistrate with all possible expedition. (*n*) If this offence were accompanied with some degree of maintenance given to the felon, the party committing it might be liable as an accessory after the fact. (*o*)

Indictable offences.

It is clear that all *felonies*, and all kinds of *inferior crimes* of a *public nature*, as misprisions, and all other contempts, all disturbances of the peace, oppressions, misbehaviour by public officers, and all other misdemeanors whatsoever of a *public* evil example against the common law, may be indicted. (*p*) And it seems to be an established principle, that

(*i*) 3 Burn. Just. tit. *Misdemeanor*, citing Barlow's Justice, tit. *Misdem.*

(*k*) 4 Black. Com. 5. note 2. 3 Burn. Just. tit. *Misdemeanor.*

(*l*) 1 Hawk. c. 20. s. 2. and c. 50. s. 1, 2. Burn. Just. tit. *Felony.*

(*m*) 1 Hawk. P. C. c. 59. s. 2. *Post*, Book II. Chap. XIV.

(*n*) 3 Inst. 140. 1 Hale 371 to 375.

(*o*) 1 Hawk. P. C. c. 59. s. 6. The concealment of *treasure trove* is misprision of felony. 4 Blac. Com. 121. 3 Inst. 133.

(*p*) 2 Hawk. P. C. c. 25. s. 4. As to misbehaviour by public officers, see *post*, Book II. Chap. XV.

whatever openly outrages decency, and is injurious to public morals, is a misdemeanor at common law. (*q*) Also it seems to be a good general ground, that wherever a statute prohibits a matter of public grievance to the liberties and security of a subject, or commands a matter of public convenience, as the repairing of the common streets of a town, an offender against such statute is punishable not only at the suit of the party aggrieved, but also by way of indictment for his contempt of the statute, unless such method of proceeding do manifestly appear to be excluded by it. (*r*) But no injuries of a *private* nature are indictable, unless they in some way concern the king. (*s*)

Attempts to commit crimes.

So long as an act rests in *bare intention* it is not punishable: but immediately when an act is done, the law judges not only of the act done, but of the intent with which it is done; and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable. (*t*) Thus, an attempt to commit a felony is, in many cases, a misdemeanor: (*u*) and an attempt to

(*q*) 4 Blac. Com. 65 (n). 13*th edit.* 1 Hawk. P. C. c. 5. s. 4. 1 East. P. C. c. 1. s. 1. and see Rex *v.* Sir Charles Sedley, Sid. 168. 1 Keb. 620. and Rex *v.* Crunden, 2 Campb. 89. Cases of men indecently exposing their naked persons.

(*r*) 2 Hawk. P. C. c. 25. s. 4. and see 1 Hawk. P. C. c. 22. s. 5. where it is laid down that every contempt of a statute is indictable. But it is questionable, where the party offending has been fined, if he may afterwards be indicted: and where a statute extends only to private persons, or chiefly relates to disputes of a private nature, it is said that offences against it will hardly bear an indictment. 2 Hawk. P. C. c. 25. s. 4.

(*s*) 2 Hawk. P. C. c. 25. s. 4. This distinction is stated also to have been taken in Rex *v.* Bembridge and Powell (cited in Rex *v.* Southerton, 6 East. 136.), who were indicted for enabling persons to pass their accounts with the Pay-office in such a way as to enable them to defraud the Government. It was objected, that this was only a private matter of account, and not indictable; but the Court held otherwise, as it related to the public revenue.

(*t*) Per Lord Mansfield, Ch. J. in Schofield's case. Cald. 397.

(*u*) Higgins's case, 2 East. R. 21.

commit even a misdemeanor has been decided in many cases to be itself a misdemeanor. (*w*) And the mere *soliciting* another to commit a felony is a sufficient act or attempt to constitute the misdemeanor. Thus, to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the servant stole the goods, nor that any other act was done except the soliciting and inciting. (*x*) It was held not to be necessary, in order to shew that this was only a misdemeanor, to negative the commission of the felony; as none of the precedents of indictments for attempts to commit rape or robbery contain any such negative averment: but it is left to the defendant to shew, if he please, that the misdemeanor was merged in the greater offence. And it has been held, that the completion of an act, criminal in itself, is not necessary to constitute criminality. (*y*)

Upon the same principles some earlier cases appear to have proceeded. Thus, it was held indictable to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies. (*z*) And an

But in 1 Hawk. P. C. c. 25. s. 3. is the following passage:—"The bare "intention to commit a felony is "so very criminal, that at the "common law it was punishable "as felony where it missed its "effect through some accident, no "way lessening the guilt of the "offender. But it seems agreed "at this day, that felony shall not "be imputed to a bare intention to "commit it; yet it is certain that "the party may be very severely "fined for such an intention." Probably the latter part of this passage was intended to relate to an intention manifested by some *act*.

(*w*) Per Grose, J. in Higgins's case, 2 East. R. 8. and see Rex *v.* Phillips, 6 East. 464. where an *endeavour* to provoke another to commit the misdemeanor of sending a challenge to fight, was held to be an indictable misdemeanor. And by Lawrence, J. in Higgins's case, "all such acts or *attempts* as "tend to the prejudice of the com-"munity are indictable."

(*x*) Higgins's case, 2 East. R. 5. in which see many cases cited, where attempts to commit felonies and misdemeanors have been considered as misdemeanors.

(*y*) By Lord Mansfield in Rex *v.* Schofield, Cald. 400.

(*z*) Vaughan's case, 4 Burr. 2494. and see Rex *v.* Pollman and others, 2 Campb. 229. where a conspiracy

information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor: (*a*) an information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*b*) And it is laid down generally, that if a party offers a bribe to a judge, meaning to corrupt him in the cause depending before him, and the judge takes it not, yet this is an offence punishable by law in the party that offers it. (*c*) And an attempt to suborn a person to commit perjury, upon a reference to the judges, was unanimously holden by them to be a misdemeanor. (*d*)

An act done, and a criminal intention joined to that act, are sufficient.

In a case where the defendant was indicted for a misdemeanor in having coining instruments in his custody, with *intention* to coin half guineas, shillings, and sixpences, and to utter them as and for the legal current coin, *Lord Hardwicke* doubted what the offence was; and the defendant being convicted, the indictment was removed into the King's Bench by certiorari for the opinion of that Court. Upon argument, and several cases cited, the Court held the offence to be a misdemeanor, and the conviction right; Lee, C. J. saying, that "all that was necessary in such a case, was an "act charged, and a criminal intention joined to that "act." (*e*) And in another case it was held, that the unlawful procuring of counterfeit coin, *with intent to circulate* it, though no act of uttering was proved, was a misde-

to obtain money by procuring from the Lords of the Treasury the appointment of a person to an office in the Customs, was held to be a misdemeanor at common law.

(*a*) Plympton's case, 2 Lord Raym. 1377.

(*b*) Young's case cited in Higgins's case, 2 East. R. 14 and 16.

(*c*) 3 Inst. 147. and see in Rex *v.* Cassano, 5 Esp. 231. an information for attempting to bribe an officer of the Customs.

(*d*) Anon. before Adams, B. at *Shrewsbury*, cited in Schofield's case, Cald. 400. and in Higgins's case, 2 East. R. 14. 17. 22. This case is probably the same as Rex *v.* Edwards, MS. Sum. tit. *Perjury*.

(*e*) Sutton's case, Rep. temp. Hardw. 370. 2 Str. 1074.

meanor; and the possession of such coin unaccounted for under suspicious circumstances (the coin being newly finished, all of it appearing to be of the same make, and not to have been in circulation,) was held to be evidence of an unlawful procurement with intent to circulate. (*f*) In the former case there were cited in support of the prosecution, a case of a conviction of three persons for having in their custody divers picklock keys *with intent* to break houses and steal goods; (*g*) and a case of an indictment for making coining instruments, and having them in possession *with intent* to make counterfeit money; (*h*) and also a case where the party was indicted for buying counterfeit shillings with an intent to utter them in payment. (*i*)

Persons having implements of house-breaking with felonious intent.

With respect to persons having implements for housebreaking, &c. in their possession with a *felonious intent*, the legislature has lately made some provision. The 23d Geo. III. c. 88. enacts, that if any person shall be apprehended, having upon him any picklock key, crow, jack, bit, or other implement, with an intent feloniously to break and enter into any dwelling-house, warehouse, coach-house, stable, or out-house; or shall have upon him any pistol, hanger, cutlass, bludgeon, or other offensive weapon, with intent feloniously to assault any person, or shall be found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, or garden, or area belonging to any house, with an intent to steal any goods and chattels, every such person shall be deemed a rogue and vagabond

(*f*) Stewart's case, *Bodmin* Sum. Assiz. 1814, before Gibbs, C. J. reserved by him, and decided upon by the Judges in Mich. T. 1814. *MS.* In the marginal note to Parker's case, 1 Leach 41, it is stated, that having the possession of counterfeit money with intention to pay it away as and for good money, is an indictable offence at common law: and this may be law in many cases of such possession But *qu.* if the point, as stated in the marginal note, was actually decided in Parker's case.

(*g*) Lee and others (case of) *Old Bailey*, 1689.

(*h*) Brandon's case, *Old Bailey*, 1698.

(*i*) Cox's case, *Old Bailey*, 1690.

within the intent and meaning of the 17th Geo. II. c. 5. And in some instances an act, accompanied with a certain intent, has been made a felony by particular statutes; as by the 25th Geo. II. c. 10. s. 1. the breaking or entering by force into any mines of black lead *with intent* to steal, is made felony punishable by imprisonment and whipping, or by transportation. And the 4th Geo. III. c. 37. s. 16. enacts, that if any person shall, by day or night, break into or enter by force any house or other place mentioned in the act *with intent* to steal, cut, or destroy *linen yarn* belonging to a linen manufactory, or the looms, &c. he shall be guilty of felony without benefit of clergy.

Offences created by statute, when indictable.

Where an offence is not so at common law, but *made an offence* by act of parliament, an indictment will lie where there is a general prohibitory clause in such statute, though there be afterwards a particular provision and a particular remedy given. (*k*) For it is a clear and established principle that when a new offence is created by an act of parliament, and a penalty is annexed to it by a separate and substantive clause, it is not necessary for the prosecutor to sue for the penalty, but he may proceed on the prior clause, on the ground of its being a misdemeanor. (*l*) And wherever a statute *forbids* the doing of a thing, the doing it wilfully,

(*k*) Rex *v.* Wright, 1 Burr. 543.

(*l*) By Ashurst J. in Rex *v.* Harris, 4 T. R. 205. And this principle will apply, though the clause annexing the penalty be in the same section of the statute. Thus the 5th Eliz. c. 4. s. 31. enacted "that *it shall not be lawful* to any "person to set up, &c. any craft, "mystery, &c. except he shall have "been brought up therein seven "years as an apprentice, &c." *upon pain* that every person willingly offending or doing the contrary forfeit for every default forty shillings for every month; and the method of proceeding upon this statute was either by information *qui tam* in the court of oyer and terminer or sessions of the county, &c. where the offence was committed, to recover the penalty, or by *indictment* in those courts. See the cases collected in the note to Rex *v.* Kilderby, 1 Saund. 312. a. This enactment of the statute of Eliz. is now repealed by 54 Geo. III. c. 96.

although without any corrupt motive, is indictable. (*m*) If a statute *enjoin* an act to be done without pointing out any mode of punishment, an indictment will lie for disobeying the injunction of the legislature. (*n*) And this mode of proceeding in such case is not taken away by a subsequent statute pointing out a particular mode of punishment for such disobedience. (*o*) And where a statute adds a further penalty to an offence prohibited by the common law, there is no doubt but that the offender may still be indicted, if the prosecutor think fit, at the common law. (*p*) It may be observed also, that it is an offence at common law to obstruct the execution of powers granted by statute. (*q*)

When offences created by statute are not indictable.

But where the statute making the new offence is not prohibitory, but only inflicts the forfeiture and specifies the remedy, an indictment will not lie. (*r*) The true rule has been laid down thus; that where the offence was punishable *before* the statute prescribing a particular method of punishing it, then such particular remedy is *cumulative*, and does not take away the former remedy; but where the statute only enacts, "that the doing any act, not punishable *before*, "shall for the future be punishable in such and such a par- "ticular manner," there the particular method prescribed by the act must be specifically pursued, and not the common law method of indictment. (*s*) The mention of other me-

(*m*) Rex *v.* Sainsbury, 4 T. R. 457.

(*n*) Rex *v.* Davis, Say. 133.

(*o*) Rex *v.* Boyal, 2 Burr. 832. Rex *v.* Balme, Cowp. 648. cited in the notes to 2 Hawk. P. C. c. 25. s. 4. And, generally speaking, the Court of K. B. cannot be ousted of its jurisdiction but by express words, or by necessary implication. By Ashurst J. in Cates *v.* Knight, 3 T. R. 445.

(*p*) 2 Hawk. P. C. c. 25. s. 4. Rex *v.* Wigg, Lord Raym. 1163. 2 Salk. 460.

(*q*) Rex *v.* Smith and others, Dougl. 441. And an indictment for such offence need not, and ought not, to conclude *contra formam statuti.*

(*r*) Rex *v.* Wright, 1 Burr. 543. Rex *v.* Douse, 1 Lord Raym. 672.

(*s*) By Lord Mansfield, in Rex *v.* Robinson, 2 Burr. 805. Rex *v.* Boyall, 2 Burr. 832. See also Hartley *v.* Hooker, Cowp. 524. Rex *v.* Balme, Cowp. 650.

thods of proceeding impliedly excludes that of indictment. (*t*) Thus it has been held, (*u*) and seems now to be settled, (*w*) that where a statute making a new offence not prohibited by the common law appoints a particular manner of proceeding against the offender, as by commitment or action of debt or information, without mentioning an indictment, no indictment can be maintained. Accordingly it was held not to be an indictable offence to keep an alehouse without a licence, because a particular punishment, namely, that the party be committed by two justices, was provided by the statute. (*x*) And an indictment for assaulting and beating a custom-house officer in the execution of his office was quashed, because the statute 3 Car. I. c. 3. appointed a particular mode of punishment for that offence. (*y*) So an indictment for killing a hare was quashed, on the ground that it was not indictable; the statute 5 Anne, c. 14. having appointed a summary mode of proceeding before justices. (*z*) In one case, where no appropriation of the penalty, nor mode of recovering it, was pointed out by the statute, the Court held that it could not be recovered by indictment; but was in the nature of a debt to the crown, and suable for in a Court of revenue only. (*a*)

Cases not indictable.

Amongst other decisions as to cases which cannot be made the subject of indictment, it appears to have been ruled that an iudictment will not lie for setting a person on the footway in a street to distribute handbills whereby the footway was impeded and obstructed; (*b*) nor for throwing down

(*t*) 2 Hawk. c. 25. s. 4.

(*u*) Glass's case, 3 Salk. 350.

(*w*) 2 Hawk. c. 25. s. 4.

(*x*) Anon. 3 Salk. 25. S. P. Watson's case, 1 Salk. 45. and Rex *v.* Edwards, 3 Salk. 27. And see Faulkner's case, 1 Saund. 248. and Mr. Serj. Williams's note (3.) at page 250. c.

(*y*) Anon. 2 Lord Raym. 991. 3 Salk. 189. Rex *v.* James, cited in Rex *v.* Buck, 1 Stra. 679.

(*z*) Rex *v.* Buck, 1 Stra. 679.

(*a*) Rex *v.* Malland, 2 Stra. 828. a case upon the 12th Geo. I. c. 25. which imposes a penalty of 20*s.* per thousand for burning place bricks and stock bricks together.

(*b*) Rex *v.* Sermon, 1 Burr. 516. But it was held by Lord Ellenbo-

skins into a public way, by which a personal injury is accidentally occasioned; (*c*) nor for acting, not being qualified, as a justice of peace; (*d*) nor for selling short measure; (*e*) nor for excluding commoners by inclosing; (*f*) nor for an attempt to defraud, if neither by false tokens or conspiracy; (*g*) nor for secreting another; (*h*) nor for bringing a

rough that every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence in Rex *v.* Cross, 3 Camph. 227. where it was held to be an indictable offence for stage coaches to stand plying for passengers in the public streets.

(*c*) Rex *v.* Gill, 1 Stra. 190.

(*d*) Castle's case, Cro. Jac. 643.

(*e*) Rex *v.* Osborn, 3 Burr. 1697: but selling *by false measure* is indictable. *Ibid.*

(*f*) Willoughby's case, Cro. Eliz. 90.

(*g*) Rex *v.* Channell, 2 Stra. 793. Indictment against a miller for taking and detaining part of the corn sent to him; and Rex *v.* Bryan, 2 Stra. 866. Anon. 6 Mod. 105. Rex *v.* Wheatley, 2 Burr. 1125. Rex *v.* Wilders, cited 2 Burr. 1128. and Rex *v.* Haynes, 4 M. & S. 214. This last case was an indictment against a miller, for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal, different from the produce of the barley, and which was musty and unwholesome. On the part of the prosecution, a note in 1 Hawk. P. C. c. 71. s. 1. referring to 1 Sess. Ca. 217. was cited, where it is laid down, "that changing corn by a "miller, and returning bad corn "instead of it, is punishable by indictment; for, being in the way "of trade, it is deemed an offence "against the public;" but it was held, that the indictment would not lie. Lord Ellenborough, in giving judgment, said, that if the allegation had been that the miller delivered the mixture as an article for the food of man, it might possibly have sustained the indictment, but that he could not say that its being musty and unwholesome necessarily and ex vi termini imported that it was for the food of man: and it was not stated that it was to be used for the sustentation of man, but only that it was a mixture of oat and barley meal. His Lordship then proceeds: "as to the other "point, that this is not an indictable offence, because it respects "a matter transacted in the course "of trade, and where no tokens "were exhibited by which the party "acquired any greater degree of "credit, if the case had been that "this miller was owner of a soke-"mill, to which the inhabitants of "the vicinage were bound to re-"sort, in order to get their corn "ground, and that the miller, abus-"ing the confidence of this his si-"tuation, had made it a colour for "practising a fraud, this might "have presented a different as-"pect; but as it now is, it seems to

bastard child into a parish; (*i*) nor for entertaining idle and vagrant persons in the defendant's house; (*k*) nor for keeping a house to receive women with child, and deliver them. (*l*) And cases of *non-feazance* and *particular wrong* done to another are not in general the subject of indictment: but it was the opinion of a very able judge, that circumstances may exist of mere *non-feazance* towards a child of tender years (such as the neglect or refusal of a master to provide sufficient food and sustenance for such a child, being his servant and under his dominion and controul), which may amount to an indictable offence. (*m*)

It has been held, that where a mayor of a city, being a justice, made an order that a company in the city should admit one to be a freeman of that corporation, and the mas-

" be no more than the case of a " common tradesman, who is guilty " of a fraud in a matter of trade or " dealing, such as is adverted to in " Rex *v.* Wheatley, and the other " cases, as not being indictable." And see also Rex *v.* Bower, Cowp. 323, as to the point that for an imposition, which a man's own prudence ought to guard him against an indictment, does not lie, but he is left to his civil remedy. But in Rex *v.* Dixon, 4 Campb. 12. it was held, that a baker who sells bread containing alum, in a shape which renders it noxious, is guilty of an indictable offence, if he ordered the alum to be introduced into the bread, although he gave directions for mixing it up in a manner which would have rendered it harmless.

(*h*) Rex *v.* Chandler, 2 Lord Raym. 1368: an indictment for secreting A., who was with child by the defendant, to hinder her evidence, and to elude the execution of the law for the crime aforesaid.

(*i*) Rex *v.* Warne, 1 Stra. 644, it appearing that the parish could not be burthened, the child being born out of it. But see a precedent of an indictment for a misdemeanor at common law, in lodging an inmate, who was delivered of a bastard child, which became chargeable to the liberty. 2 Chit. Crim. Law, 700. And see also *id.* 699. and 4 Wentw. 353. Cro. Circ. Comp. (7th ed.) 648, precedents of indictments for misdemeanors at common law, in bringing such persons into parishes in which they had no settlements, and in which they shortly died, whereby the parishioners were put to expence.

(*k*) Rex *v.* Langley, 1 Lord Raym. 790.

(*l*) Rex *v.* Macdonald, 3 Burr. 1646.

(*m*) Ridley's case, 2 Campb. 650.

ter of the company being served with the order, refused to obey it, such refusal was not the subject of indictment. (*n*) And an indictment will not lie for not curing a person of a disease according to promise, for it is not a public offence, and no more in effect than a ground for an action on the case. (*o*) To keep an open shop in a city, not being free of the city, contrary to the immemorial custom there, has been held not to be indictable. (*p*)

With regard to *trespasses*, it has been held that a mere act of trespass (such as entering a yard and digging the ground, and erecting a shed or cutting a stable,) committed by one person, unaccompanied by any circumstances constituting a breach of the peace, is not indictable; and the Court quashed such indictment on motion. (*q*) And an indictment against one person for pulling off the thatch of a man's house, who was in the peaceable possession of it, was also quashed on motion. (*r*) But where the indictment stated the entering a dwelling-house, and *vi et armis and with strong hand* turning out the prosecutor, the Court refused to quash it. (*s*) And an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace: (*t*) and though such goods are the prosecutor's own property, yet, if he take them in that manner, he will be guilty. (*u*)

(*n*) Rex *v.* Atkinson, 3 Salk. 188.

(*o*) Rex *v.* Bradford, 1 Lord Raym. 366. 3 Salk. 189. In an anon. case, 2 Salk. 522, it appears to have been held, that if a pawnbroker refuses, upon tender of the money, to deliver the goods pledged, he may be indicted. But Rex *v.* Jones, 1 Salk. 379. is *contra*.

(*p*) Rex *v.* George, 3 Salk. 188. Nor is it an indictable offence to exercise trade in a borough contrary to the bye-laws of that borough. Rex *v.* Sharpless, 4 T. R. 777.

(*q*) Rex *v.* Storr, 3 Burr. 1699.

(*r*) Rex *v.* Atkins, 3 Burr. 1706.

(*s*) Rex *v.* Storr, 3 Burr. 1699.

(*t*) Anon. 3 Salk. 187.

(*u*) *Ibid.*

BOOK THE SECOND.

OF OFFENCES PRINCIPALLY AFFECTING THE GOVERNMENT, THE PUBLIC PEACE, OR THE PUBLIC RIGHTS.

CHAPTER THE FIRST.

Of counterfeiting or impairing Coin.—Of Importing into the Kingdom counterfeit or light Money.—And of Exporting counterfeit Money.

SECT. I.

OF COUNTERFEITING COIN.

THE legislature has thought fit to make provision against the counterfeiting of the following descriptions of coin, namely:—I. The king's money, properly so called.—II. Foreign gold, silver, or copper coin.—And, III. The copper money of this realm.

Of counterfeiting the king's money.

I. The first of these, the king's money, is protected by enactments, which place the offence of counterfeiting it in the highest class of crimes, upon the ground that the royal majesty of the crown is affected by such offence in a great prerogative of government; the coining and legitimation of money, and the giving it its current value, being the unquestionable prerogatives of the crown. (*a*) The statute 25 Edw. III. st. 5. c. 2. declares it to be *high treason* "if a man *counterfeit the king's money.*"

(*a*) 1 Hale 188. 1 East. P. C. 148.

What is the king's money.

It appears that the coin or money of this kingdom consists properly of gold or silver only, with a certain alloy, constituting what is called *sterling*, coined and issued by the king's authority; and that the statute of Edward the Third, in mentioning "*the king's money*" generally, refers to such money; which is supposed also to be referred to by any other statute naming "money" generally.(*b*) The weight, alloy, impression, and denomination, of money made in this kingdom are generally settled by indenture between the king and the master of the mint: but the recent statute, 56 Geo. III. c. 68. has provided, with respect to the new silver coinage, that the bullion shall be coined into silver coins of a standard and fineness of eleven ounces two pennyweights of fine silver, and eighteen pennyweights of alloy in the pound troy, and in weight after the rate of sixty-six shillings to every pound troy, whether the same be coined in crowns, half crowns, shillings, or sixpences, or pieces of a lower denomination. A proclamation has in some cases been made as a more solemn manner of giving the coin currency; but the proclamation in general cases is certainly not necessary, and in prosecutions for coining need not be proved. (*c*) And it is not necessary in such prosecutions to produce the indentures; though it may be of use in case of any new coin with a new impression, not yet familiar to the people, to produce either the indentures, or one of the officers of the mint cognizant of the fact, or the stamps used, or the like evidence. But in general, whether the coin, upon a question of counterfeiting or impairing it, be the king's money or not, is a mere question of fact which may be found upon evidence of common usage or notoriety. (*d*) It should

(*b*) 1 East. P. C. 147. And see 1 Hale. chap. 17, 18. 19, and 20.

(*c*) 1 East. P. C. 149. where see some cases in which proclamation by the writ of proclamation under the great seal, or a remembrance thereof, is considered to be necessary to prove a coin current; and it is also stated, that by the act of the 37th Geo. III. c. 126. s. 1. relative to a copper coinage, the king's proclamation is made necessary, and seems, therefore, to be required in proof of any indictment upon that statute.

(*d*) 1 East. P. C. 149. But in the

be observed, that any coin, once legally made and issued by the king's authority, continues to be the current coin of the kingdom until recalled, notwithstanding any change in the authority by which it was constituted. (*e*)

Some verbal difference is observable in the wording of several of the statutes on the subject of the coin since the Revolution. The statute 8 and 9 W. III. c. 26. speaks of the gold and silver coin "of this kingdom," or "current within this kingdom." The statute 15 Geo. II. c. 28. in one part expresses by name "guineas and half guineas," and "shillings and sixpences," and is consequently confined to those identical coins. In another part it speaks of counterfeit money generally. The statute 11 Geo. III. c. 40. as to the copper coin, and the statute 37 Geo. III. c. 126. s. 2. as to gold and silver coin, describe each as the coin of "this realm," following the words of the more ancient statutes. No stress can be laid upon such verbal differences between statutes passed *in pari materiâ:* the construction which the reason of the thing points out must be such as the words are capable of receiving without violence to their proper or accepted legal signification. (*f*)

Marking the edges of coin.

Besides the counterfeiting of the king's money within the statute 25 Edw. III. st. 5. c. 2. which has been already mentioned, the offence of high treason may also be committed by *marking on the edges* of any of the current or diminished coin of this kingdom, or counterfeit coin resembling the coin of this kingdom, with letters or grainings, or other marks or figures, like those on the edges of money coined in his Majesty's mint. This provision is by stat. 8 and 9

case of old coin which has gradually fallen into disuse, though still the legal coin of the king, there can be no general notoriety of the fact.

(*e*) 1 East. P. C. 148. where it is said also, that this recal may be by proclamation; and long disuse may, it is conceived, be evidence of it. It has also been effected by act of Parliament, as by 9 W. III. c. 2. and 6 Geo. II. c. 26.

(*f*) 1 East. P. C. 157.

W. III. c. 26. s. 3. (*g*) which enacts, that "if any person "(other than the persons employed in his Majesty's mint or "mints, or such as shall have authority from the Lords "Commissioners of the Treasury, or Lord High Treasurer "of England for the time being,) (*h*) shall *mark on the edges* "any the current coin of this kingdom; or if any person "whatsoever shall mark on the edges any of the diminished "coin of this kingdom, or any counterfeit coin resembling "the coin of this kingdom, with letters, or grainings, or "other marks or figures like unto those on the edges of "money coined in his Majesty's mint; every such offence "shall be adjudged high treason; and the offenders therein, "their counsellors, procurers, aiders, and abettors, being "thereof convicted or attainted, shall suffer death, &c." (*i*)

Making shillings or sixpences to resemble guineas or half guineas, and making halfpence or farthings resemble shillings or sixpences.

Making shillings or sixpences to resemble guineas or half guineas, and *making halfpence or farthings to resemble shillings or sixpences*, amount also to the crime of high treason. The statute 15 Geo. II. c. 28. s. 1. provides, "that if any "person shall wash, gild, or colour any of the lawful silver "coin called a shilling or a sixpence, or any counterfeit or "false shilling or sixpence, or add to or alter the impres- "sion, or any part of the impression, of either side of such

(*g*) Made perpetual by 7 Ann. c. 25.

(*h*) This exception seems unnecessary, and would have been implied by law on behalf of persons so employed by his Majesty's authority. But yet it was holden about Hilary Term 13 W. III. by all the Judges, that in an indictment on that act, it ought to be averred, that the party was not employed in the Mint, or authorized by the treasurer, &c.; because the exception of such persons is within the enacting clause; and the want of such an authority is part of the description of the offence itself. This question was moved by Mr. Justice Turton, who had convicted one upon this statute at York, upon an indictment which had not such an averment; and for this reason it was holden bad, and that the prisoner ought to be tried again, which was done at the Lent Assizes 1702, before Powis J. when the prisoner was attainted and executed. 1 East. P. C. 166, 167.

(*i*) By 7 Ann. c. 25. s. 2. the prosecution is to be commenced in six months after the offence.

" lawful or counterfeit shilling or sixpence, with intent to " make such shilling resemble, or look like, or pass for a " piece of lawful gold coin called a guinea, or with intent " to make such sixpence resemble, or look like, or pass for a " a piece of lawful gold coin called a half guinea; or shall " file or anywise alter, wash, or colour, any of the brass " monies called halfpennies or farthings, or add to or alter " the impression, or any part of the impression, of either " side of a halfpenny or farthing, with intent to make an " halfpenny resemble, or look like, or pass for a lawful shil- " ling, or with intent to make a farthing resemble, or look " like, or pass for a lawful sixpence; such offenders, their " counsellors, aiders, abettors, and procurers, shall be guilty " of high treason." (*k*)

Gilding or silvering coin or blanks, or gilding silver blanks.

There are other acts which are only preparatory to and in the progress of actually counterfeiting the coin which are made high treason by the fourth section of the statute 8 & 9 W. III. c. 26, which provides that " if any person shall " *colour, gild, or case over* with gold or silver, or with any " wash or materials producing the colour of gold or silver, " any coin resembling any of the current coin of this king- " dom, or any round blanks of base metal, or of coarse " gold or coarse silver, of a fit size and figure to be coined " into counterfeit milled money resembling any the gold or " silver coin of this kingdom, or if any person shall *gild over* " *any silver blanks* of a fit size and figure to be coined into

(*k*) But the fourth section provides, that the blood shall not be corrupted. By the fifth section, offenders are to be indicted, arraigned, tried, and convicted, by such like evidence, and in such manner, as were then used and allowed against any offenders for counterfeiting the lawful coin; provided that there shall be no prosecution for any of the offences made treason or felony by that act, unless such prosecution be commenced within six months next after the offence committed. The eighth section provides, that the offender shall be pardoned in case (being out of prison) he discovers two or more offenders of the same kind mentioned in the act, so as they shall be thereof convicted.

" pieces resembling the current gold coin of this kingdom," all such offenders, their counsellors, procurers, aiders, and abettors, shall be guilty of high treason." (*l*)

The statute 56 Geo. III. c. 68. s. 17, relating to the *new silver coinage* enacts that all and every act and acts in force immediately before the passing of that act respecting the coin of this realm, or the clipping, diminishing, or counterfeiting of the same, or respecting any other matters relating thereto, and all provisions, proceedings, penalties, forfeitures, and punishments therein contained or directed, not expressly repealed by that act, and not repugnant or contradictory to the enactments and provisions of that act, shall be and continue in full force and effect; and shall be applied and put in execution with respect to the silver coin to be coined in pursuance of the directions of that act as fully and effectually to all intents and purposes whatsoever, as if the same were repeated and re-enacted in that act.

These statutes of 25 Edw. III. 8 & 9 W. III. 15 Geo. II. and 56 Geo. III. c. 68, relate only to the coin of the realm usually called, in the sense which has been before given, the king's money. We come now to the counterfeiting of foreign coin.

Of counterfeiting foreign gold, silver, or copper coin.

II. The counterfeiting of *foreign coin* either of gold, silver, or copper, is made highly penal by several statutes. Counterfeiting such *gold or silver* foreign coin as is current here was made treason for the first time by the statute 4 Hen. VII. c. 18. That statute was repealed by 1 Mar. c. 1. but its provisions were revived by 1 Mar. st. 2. c. 6. which enacts that " if any person or persons falsely forge or " counterfeit any such kind of coin of gold or silver, as is

(*l*) No corruption of blood. Prosecutions are to be commenced within three months after the offence committed, s. 9. But in Willace's case, 1 East. P. C. c. 4. s. 31. p. 186, it was held that the information and proceeding before a magistrate were the commencement of the prosecution, and not the preferring the indictment.

" not the proper coin of this realm, and is or shall be *cur-*
" *rent* within this realm by the consent of the crown, they
" and their counsellors, procurers, aiders, and abettors, shall
" on conviction be adjudged guilty of *high treason.*" (*m*)
The statute 14 Eliz. c. 3, enacts that " if any person
" falsely forge or counterfeit any kind of coin of gold or
" silver of other realms as is not the proper coin of this
" realm, *nor permitted to be current* within this realm ; such
" offence shall be adjudged *misprision of high treason ;* and
" the offenders, their procurers, aiders, (*n*) and abettors,
" being convict, shall be imprisoned, and forfeit such lands
" goods and chattels as in case of misprision of treason."
Both these statutes are to be understood of the counterfeiting of such foreign coin as is for the most part gold or silver : (*o*) and the offence described in the statute of Elizabeth was only punishable at common law as a misdemeanor. (*p*)

The statute 37 Geo. III. c. 126, recites the great increase of the practice of counterfeiting gold or silver coin *not current here*, and enacts " that if any person or persons shall
" hereafter make, coin, or counterfeit, any kind of coin not
" the proper coin of this realm, *nor permitted to be current*
" *within the same*, but resembling or made with intent to
" resemble or look like any gold or silver coin of any fo-
" reign state, &c. or to pass as such foreign coin ; such per-
" son or persons offending therein shall be deemed guilty of
" *felony*, and may be transported for any term of years not
" exceeding seven." By the words " not permitted to be
" current within the realm," must be understood not per-

(*m*) The consent of the crown must be notified under the great seal by proclamation, and a writ annexed thereto; the statute 17 Rich. II. c. 1. having provided that foreign coin shall not run in payment in England.

(*n*) By " aiders" is meant such as aid in the fact, and not aiders of the offender after the fact. 1 Hale 376.

(*o*) 1 Hale 210, 311, 328.

(*p*) 1 East. P. C. ch. 4. s. 10. p. 160.

mitted to be current by proclamation under the great seal. (*q*)

The statute 43 Geo. III. c. 139, s. 3, relates to the counterfeiting of foreign coin of *copper*, or of other metal of less value than silver, *not current here*, and enacts "That if any "person shall within any part of the united kingdom make, "coin, or counterfeit, any kind of coin not the proper coin "of this realm, nor ordered by the royal proclamation of "his Majesty, his heirs, or successors, to be deemed and "taken as current money of this realm, or any part thereof, "but resembling or made with intent to resemble any cop- "per coin, or any other coin made of any metal or mixed "metals of less value than the silver coin of any foreign "prince, state, or country, respectively, or to pass as such "foreign coin, then every person so offending shall be "deemed and taken to be guilty of a *misdemeanor* and "breach of the peace; and being thereof convicted accord- "ing to law, shall for the *first offence* be imprisoned for any "time not exceeding one year; and for the *second offence* "be *transported* to any of his Majesty's colonies or planta- "tions for the term of seven years." The act further provides that persons against whom any bill of indictment shall be found shall not be entitled to traverse the same to any subsequent assizes or sessions, but shall be tried upon the bill being found, unless there shall be good cause why the trial should be postponed. (*r*) And a provision is also made for the *certificate* of a former conviction being sufficient evidence of that fact in cases where persons are tried for second offences. (*s*)

(*q*) 1 East. P. C. ch. 4. s. 10. p. 161, and ch. 10. s. 3. and 6. The sixth section of the 37 Geo. III. c. 126, makes persons having in their custody more than five pieces of such counterfeit foreign coin liable to a penalty not exceeding £5, nor less than 40*s*. upon conviction before a justice of peace, for every such piece of coin. And the proceedings before the justice are not to be quashed for want of form, or removed by *certiorari*.

(*r*) S. 4.

(*s*) S. 5. By the sixth section of the act persons having more than

Of counterfeiting copper money.

III. The statute 15 Geo. II. c. 28. s. 6, reciting that the coining or counterfeiting the *copper money of this kingdom* was only a *misdemeanor*, and the punishment often very small, enacts that any person making, coining, or counterfeiting, any brass or copper money commonly called a *halfpenny* or a *farthing*, his aiders, abettors, and procurers, shall suffer two years' imprisonment, and find sureties for good behaviour for two years more. (*t*) But the 11 Geo. III. c. 40. s. 1, makes the offence *felony*, enacting "that if any person shall make, coin, or counterfeit, any of "the copper monies of this realm commonly called a *half-*"*penny* or a *farthing*, such offender, his counsellors, aiders, "abettors, and procurers, shall be adjudged guilty of fe-"lony." But clergy is not taken away, and the punishment under this statute appears to be only a year's imprisonment; which punishment is founded on the general statute of 18 Eliz. c. 7. s. 3. (*u*)

The statute 37 Geo. III. c. 126, enacts that the provisions of the 15 Geo. II. c. 28, relating to the copper monies of the realm commonly called a halfpenny and a farthing, and also the statute 11 Geo. III. c. 40, and all other acts concerning the copper monies of the realm commonly called a halfpenny and a farthing, or *any other copper money* of the realm, shall extend "to all such pieces of "copper money as shall be coined and issued by order of "his Majesty, his heirs, and successors, and as shall by his "or their royal proclamation be ordered to be deemed and

five pieces of such counterfeit foreign coin in their possession are liable to a penalty not exceeding 40*s.* nor less than 10*s.* upon conviction before a justice of the peace. And by s. 8. no proceeding touching the conviction of any offender before any justice of the peace shall be quashed for want of form, or removed by *certiorari*.

(*t*) If offenders being out of prison impeach two others so that they shall be convicted, the offenders so impeaching shall be pardoned. s. 8.

(*u*) Rex *v.* West and others, 1 East. P. C. c. 4. s. 11. p. 162. The stat. 18 Eliz. c. 7. s. 3, provides that upon allowance of clergy the offenders may be imprisoned for any time not exceeding a year.

"taken as current money of this realm," in the same manner as if such pieces had been particularly mentioned and described in such acts respectively. From the manner in which the King's proclamation is here made necessary to the currency of the coin, it seems to be required in proof of any indictment upon this statute. (*w*)

It is stated as a question whether under this statute it is not optional to prosecute either for a misdemeanor as the offence is made by the statute 15 Geo. II.; or for a felony as it is made by that of the 11 Geo. III.; since the provisions of both statutes are extended to any new copper coinage. But yet it is observed, that such an option, without varying circumstances, is unusual, and incongruous with the general rule of law, that the misdemeanor is merged in the felony. (*x*)

The offence of counterfeiting the coin may be committed by officers in the mint.

With respect to the offence of counterfeiting the coin in general it may be observed, that not only all such as counterfeit the king's coin without his authority, but even such as are employed by him in the mint, come within the statutes, if for their own lucre they make the money of baser alloy, or lighter than by their indentures they are authorized and bound to do: for they can only justify their coining at all under such an authority; and if they have not pursued that authority, it is the same as if they had none. But it is not any mistake in weight or alloy that will make them guilty of high treason; the act must be wilful, corrupt, and fraudulent, for it must be laid and proved to be done traitorously. (*y*)

What will be a sufficient counterfeiting.

The monies charged to be counterfeited must *resemble the true and lawful coin;* (*z*) but this resemblance is a matter of fact of which the jury are to judge upon the evidence before

(*w*) 1 East. P. C. c. 4. s. 2. p. 149.
(*x*) 1 East. P. C. c. 4. s. 11. p. 162.
(*y*) 1 East. P. C. c. 4. s. 15, p. 166. 1 Hale 213. 1 Hawk. P. C. c. 17, s. 55. 3 Inst. 16, 17. 4 Blac. Com. 84.
(*z*) 1 Hawk. P. C. c. 17. s. 81.

them; the rule being, that the resemblance need not be perfect, but such as may in circulation ordinarily impose upon the world. (*a*) Thus a counterfeiting with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin. (*b*)

Round blanks like shillings worn smooth by circulation.

It is quite clear that there will be a sufficient counterfeiting within the statutes, where the counterfeit money is made to resemble coin, the impression on which has been *worn away by time*. In one case the shillings produced in evidence against the prisoner were quite smooth, without the smallest vestige of either head or tail, and without any resemblance of the shillings in circulation, except their colour, size, and shape; and the master of the mint proved that they were bad, but that they were very like those shillings the impression on which had been worn away by time, and might very probably be taken by persons having less skill than himself for good shillings. And the Court were of opinion that *a blank* that is smoothed, and made like a piece of legal coin, the impression of which is worn out, and yet suffered to remain in circulation, is sufficiently counterfeited to the similitude of the current coin of this realm to bring the counterfeiters and coiners of such blanks within the statute; these blanks having some reasonable likeness to that coin which has been defaced by time, and yet passes in circulation. (*c*) In a subsequent case the point received the more solemn consideration of the twelve judges, the counsel for the prisoners having objected upon the fact of no impression of any sort or kind being discernible upon the shillings produced in evidence, that they were not counterfeited to *the likeness and similitude of the good and legal coin of the realm*. But the judges were of opinion, that it

(*a*) 1 Hale 178. 184. 211. 215.

(*b*) 1 East. P. C. c. 4. s. 13. p. 164, citing 1 MS. Sum. 50. and Ridgeley's case, Old Bailey, Dec. 1778.

(*c*) Wilson's case, Old Bailey, 1783, 1 Leach 285.

was a question of fact whether the counterfeit monies were of the likeness and similitude of the lawful current silver coin called a shilling. And the jury having so found it, the want of an impression was immaterial; because, from the impression being generally worn out or defaced, it was notorious that the currency of the genuine coin of that denomination was not thereby affected; the counterfeit therefore was perfect for circulation, and possibly might deceive the more readily from having no appearance of an impression: and in the deception the offence consists. (*d*)

Where the false coin is so imperfect as not to be passable, the offence of counterfeiting will not be complete.

But where the imitation of the real coin has not proceeded so far as to fabricate a false coin sufficiently perfect to be circulated, the offence of counterfeiting will not, it seems, be complete. Thus where the prisoner had forged the impression of a half guinea on a piece of gold, which was previously hammered, but was not round, nor would pass in the condition it then was, upon reference to the judges it was held that the crime of counterfeiting was incomplete. (*e*) And where the prisoners were convicted upon a count in the indictment framed upon the statute 25 Edw. III. c. 2. and upon the evidence it appeared that no one piece of the base metal found upon the prisoners was in such a state as to make it passable, the conviction was held to be wrong. (*f*)

As to what will be a colouring within the statute 8 & 9 W. 3. c. 26.

Besides the offence of counterfeiting to the resemblance which has been already mentioned, the statutes extend to the offence of *colouring* any false coin or blanks of base metal; and it has been made a question upon the statute

(*d*) Welsh, Patrick and John, (case of) 1 Leach 364. 1 East. P. C. c. 4. s. 13. p. 164.

(*e*) Varley's case, 1 Leach 76. 1 East. P. C. c. 4. s. 13. p. 164. 2 Blac. Rep. 682.

(*f*) Harris and Minion, (case of) 1 Leach 135. The case was referred to the judges, but the grounds of their decision are not stated in the report. And *qu.* if the case was not disposed of upon a defect in the indictment. Besides the count on the 25th Edw. III. c. 2. there was another count upon the 8th and 9th W. III. c. 26. s. 4.

8 and 9 W. III. c. 26. s. 4. what will amount to a colouring. In an indictment upon this statute the jury found the prisoners guilty upon very clear and satisfactory evidence; but it appeared that the colour of silver was produced by melting a small portion of good silver with a large portion of base metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which has the effect of drawing to the surface whatever silver there may be in the composition, and giving the metal the colour and appearance of real silver. A doubt therefore arose, whether this process of extracting the latent silver by the power of the wash from the body to the surface of the blank was colouring with "a wash and materials" within the meaning of the statute; or whether the legislature did not intend such a colouring only as is produced by some external application on the surface of the blank. But the judges thought that this process of extracting the latent silver from the body to the surface of the base metal by the power of *aqua fortis* was a *colouring* within the words of the statute; (*g*) and they also thought that it might be charged as a colouring with silver; for the effect of the aqua fortis is to corrode the base metal, and leave the silver only on the superficies; and so the copper is coloured or cased with silver. (*h*)

And though it be necessary that the blanks should be *rubbed* after they are taken out of the wash, in order to give them the appearance of silver, the preparing and steeping them in the wash will be a *colouring* within the statute. A case was reserved for the opinion of the judges upon the following facts. The prisoner was apprehended in the very act of steeping round blanks composed of brass and silver in *aqua fortis:* none of them were in a finished state; but many were taken out of the liquor, and others were found dry. These blanks exhibited the appearance of lead, and some of them had the impression of a shilling, and *by rubbing*

(*g*) Lavey and Parker, (case of) 1 Leach 153.

(*h*) S. C. 1 East. P. C. c. 4. s. 14. p. 166.

them they would be made perfectly to resemble silver coin, but in their then state the jury found that none of them would pass current. The question was, whether the offence was completed, inasmuch as the colour of silver had not been produced on any of the blanks. There was some difference of opinion amongst the judges. One judge said, he understood the words "colour, &c." to mean producing on the piece of metal the colour of silver, which was not done here; for, without rubbing, the money coined would not pass: and another observed, that the word in the statute was "*producing*" in the present tense, and not materials *which would produce*. But the other judges (*i*) thought the conviction right. They considered that the offence was complete when the piece was coloured; for it was then coloured with materials which produce the colour of silver; and that it was not necessary that the piece so coloured should be current, for the colouring of blanks was an offence within the clause. And it was observed, that a contrary construction would prevent any conviction until a wash was discovered, which would in the first instance produce a perfect bright shilling or sixpence. (*k*)

Counterfeiting complete without uttering.

It should be observed, that if there be a counterfeiting in fraud of the king, the offence within the respective statutes is complete before any uttering, or attempt to utter. (*l*)

Of principals and accessories.

There appears to have been a difference of opinion with respect to *receivers* of such as counterfeit money, whether they are guilty of more than misprision of treason. (*m*)

(*i*) Absent *Perryn*, B. and *Buller*, J.

(*k*) Case's case, 1 East. P. C. c. 4. s. 14. p. 165, 166. 1 Leach 154. note (a).

(*l*) 3 Inst. 61. 1 Hale 215. 228. 1 Hawk. c. 17. s. 55. 1 East. P. C. c. 4. s. 18. p. 165.

(*m*) Misprision of treason is where a person knowing of a treason, but no party or consenter to it, does not reveal it by a fair and full disclosure in convenient time to the king, or his privy counsel, or to some magistrate or person having authority to take the examination. The punishment for misprision of high treason is the loss of the pro-

Lord Hale says, that though the more probable opinion may be that such receivers are traitors, yet the more merciful opinion is against such a construction; (*n*) and a case appears to have been ruled upon this milder ground. (*o*) But the case did not pass without doubt; and the more strict construction is stated to have been adopted by the best modern authorities, in which it was considered to result necessarily from the general rule of law, that whatever will make a man accessory before or after in felony will make him a principal in treason; and that the stat. 25 Edw. III. having declared these offences to be high treason, the consequence follows of course. (*p*) With respect to the light in which accomplices or receivers are considered in those offences concerning the coin which amount only to felony, it is settled that they follow the general rule applicable to felony. Two agree to counterfeit, and one does it in consequence of that agreement; they are both guilty. One counterfeits, and another by agreement before-hand afterwards puts it off; the latter is a principal: so if he put it off afterwards, knowing that the other coined it; for that makes him an aider: so if he furnished the coiner with tools, or materials for coining. (*q*)

Procurers, who are named in the statutes 1 Mary, stat. 2. c. 6. and 14 Eliz. c. 3. are not mentioned in the statutes 37 Geo. III. c. 126. but the offence being made felony at-

fits of lands during life, forfeiture of goods, and imprisonment during life; but misprision of petty treason is only punishable by fine and imprisonment, as in case of misprision of felony. 1 Hale 214. 371. 3, 4, 5. 3 Inst. 24. 4 Blac. Com. 120. 1 East. P. C. c. 3.

(*n*) 1 Hale 237.

(*o*) Conier's case, Dy. 296. a.

(*p*) 1 East. P. C. c. 2. s. 35. p. 95, where it is also stated as greatly strengthening this construction, that otherwise the receipt of a common felon would be a higher offence than the receipt of a traitor of this kind, which appears to be incongruous. But Mr. East says, that having contented himself with stating how the question stands, (which he does at some length) he shall forbear to advance any direct opinion of his own.

(*q*) 1 East. P. C. c. 4. s. 31. p. 186.

taches to it all the incidents of felony at common law, and consequently may have accessories. But it is questioned if they are liable to transportation, or to any other punishment than is authorised by the general act of the 18th Eliz. c. 7. s. 3. (*r*)

Evidence.

With respect to the evidence in cases which amount to treason, it appears that there is not the same necessity for two witnesses to prove the treason as in the higher species of that offence; but the offenders may be indicted, tried, convicted, or attainted by such like evidence, and in such manner and form as felons in general; except that they are entitled to a peremptory challenge of thirty-five. (*s*)

Coining tools and base money to be produced in evidence.

In many instances of offences relating to the counterfeiting coin, the legislature have made special provisions for securing the base coin, and also the tools of the offenders, in order that they may be produced in evidence, and afterwards be disposed of in a proper manner. By the 8 and 9 W. III. c. 26. s. 5. coining tools may be seized and carried to some justice of the peace, secured by him in order to be produced in evidence, and afterwards destroyed; and counterfeit or diminished money produced in any court of justice, in evidence, or otherwise, is directed to be cut in pieces in open court, or in the presence of some justice of the peace, and then to be delivered to such persons to whom the same of right shall appertain. The 11 Geo. II. c. 40. s. 3. provides, that any justice of the peace, on complaint that any person is or has been concerned in counterfeiting copper monies, may, by warrant, cause the house, &c. of such person to be searched for coining tools; and if any such be found, the person discovering the same is required to seize them, and carry them to some justice of the peace of the county, city, or place, where the same shall be seized, who is directed to cause the same to be secured and produced in evidence; and direc-

(*r*) 1 East. P. C. c. 4. s. 10. p. 161. See as to the stat. 18 Eliz. *ante*, p. 79, note (u).

(*s*) 1 East. P. C. c. 4. s. 31. p. 187.

tions are also given for defacing and destroying such tools. Provisions of a similar kind are made by the 37 Geo. III. c. 126. s. 7. with respect to searching for counterfeit gold or silver foreign coin, or for tools, implements, or materials for coining such coin, and securing the same, and producing them in evidence, and afterwards destroying or otherwise disposing of them. And the 43 Geo. III. c. 139. s. 7. authorises searching for counterfeit foreign coin of copper or metal of less value than silver, and the tools or implements for coining the same. (*t*)

(*t*) The legislature has made other provisions for the suppression of base coin, or coin inferior in value, where there is no criminal charge imputed to the person who may happen to tender it. By the stat. 9 and 10 W. III. c. 21. s. 1. any person to whom any silver money, and by stat. 13 Geo. III. c. 71. s. 1. any person to whom any gold money shall be tendered, which shall be diminished otherwise than by reasonable wearing, or which, from the appearance of it, he shall suspect to be counterfeited, may cut, break, or deface the same: but if the same shall afterwards appear to have been lawful money, the person who cut, &c. shall take the same at the rate it was coined for; and every question respecting the validity of such coin shall be finally determined by the chief magistrate of the place. The 56 Geo. III. c. 68. s. 7. also enacts, that after the period to be mentioned in a proclamation, any persons are required to cut, &c. any piece or pieces of old silver coin of this realm, current at any time before the passing of that act, which shall be tendered to them in payment, and which shall be of less value than the denomination thereof shall import, and the person tendering the same shall bear the loss; but if any such piece so cut, &c. shall appear to be of the full value which its denomination shall import, the person who shall cut, &c. is required to take the same at the rate it was coined for; and disputes about the value are to be determined by the mayor, &c. or other chief officer of any city, &c. where such tender shall be made; or if the tender be made out of any city, &c. then by some justice of the peace of the county inhabiting or being near the place where the tender shall be made.

SECT. II.

OF IMPAIRING COIN.

Clipping, washing, rounding, or filing.

BY the statute 5 Eliz. c. 11. s. 2. *clipping*, *washing*, *rounding*, *or filing*, for "wicked lucre or gain's sake, of any "of the proper monies or coins of this realm, or the domi- "nions thereof, at this present, or that hereafter at any time "shall be the lawful monies or coins of this realm, or of the "dominions thereof, or of any other realm and by procla- "mation allowed and suffered to be current here, shall be "taken, deemed, and adjudged treason; and the offenders "therein, their counsellors, consenters, and aiders, shall be "taken, deemed, and adjudged as offenders in treason; and "being thereof lawfully convicted or attainted, shall suffer "pains of death." (*u*)

Of impairing, diminishing, falsifying, scaling, or lightening.

But there were methods of falsifying, impairing, dimi- nishing, and lightening the coin, which were not compre- hended in this act of Elizabeth. A subsequent statute, 18 Eliz. c. 1. was therefore passed, which enacts, "that if any "person shall for wicked lucre or gain's sake, (*w*) by any "art, ways, or means whatsoever, *impair*, *diminish*, *falsify*, "*scale*, *or lighten*, the proper monies or coins of this realm, "or any the dominions thereof, or the monies or coins of "any other realms, allowed and suffered to be current at "the time of the offence committed within this realm of Eng- "land, or any the dominions of the same, by proclamation,

(*u*) And see 1 Hale 216, 220, 267, 318. By the provisions of this statute, all the goods and chattels of such offenders are forfeited, and all their lands and tenements during their lives; but by s. 4. the offences make no corruption of blood, or forfeiture of dower.

(*w*) The clipping, &c. within these statutes must be for *gain* or *lucre*, and must be so laid in the indictment, which must also pursue the words of the statute in describ- ing the offence; and conclude against the form of the statute, be- cause they were in some respects introductive of a new law. 1 East. P. C. c. 4. s. 20. p. 174. 1 Hale 220, 228.

" &c. shall be taken, adjudged, and deemed to be treason; " and the offenders therein, their counsellors, consenters, " and aiders, shall be likewise deemed and adjudged as of- " fenders in treason; and being thereof lawfully convicted " or attainted, shall suffer pains of death, &c." (*x*)

The impairing of Irish coin, though not current in England, is within the express words of these statutes. (*y*)

New silver coinage.

The statute relating to the new silver coinage, 56 Geo. III. c. 68. s. 17. enacts, " that all acts in force immediately be- " fore the passing of that act respecting the coin of this " realm, or the *clipping*, *diminishing*, or counterfeiting the " same, or respecting any other matters relating thereto; " and all provisions, proceedings, penalties, forfeitures, and " punishments, therein contained or directed, not expressly " repealed by that act, and not repugnant or contradictory " to the enactments and provisions of that act, shall be and " continue in full force and effect, and shall be applied and " put in execution with respect to the silver coin to be " coined in pursuance of the directions of that act, as fully " and effectually to all intents and purposes whatsoever, as " if the same were repeated and re-enacted in that act."

Having clippings, &c. in possession.

With a view of more effectually preventing the clipping, diminishing, or impairing the current coin of the kingdom, the statute 6 and 7 W. III. c. 17. s. 4. enacts, " that if any " person whatsoever shall buy or sell, and (*z*) knowingly " have in his custody or possession any clippings or filings " of the current coin of this kingdom, he shall, for every " such offence, forfeit the said clippings or filings, and also " the sum of five hundred pounds, one moiety to his Ma-

(*x*) The same provisions are made, as in the last statute, as to forfeiture and corruption of blood. s. 1, 2.

(*y*) 1 East. P. C. c. 4. s. 20. p. 174. 1 Hale 221, 222.

(*z*) It is so in the statute; but *qu.* whether it should not be " *or*" instead of " *and*." The same *qu.* is stated in the margin of 1 East. P. C. 174.

"jesty, and the other to the informer, (*a*) and shall be also "branded in the right cheek with a hot iron with the letter "R.; and until payment of the said five hundred pounds, "shall suffer imprisonment." The eighth section of the statute makes provisions for breaking open houses and searching for bullion: and the person in whose possession bullion is found, not proving it to be lawful silver, and that the same was not before the melting thereof coin, nor clippings, shall be committed to prison; and in case, on an indictment against such offender for *melting* the current silver coin of the realm, he shall not prove, by the oath of one witness at the least, the bullion so found to be lawful silver, and that the same was not the current coin of the realm, nor clippings thereof, he shall be found guilty and imprisoned for six months. Provisions concerning *melting* down coin are made by other statutes. By the 17 Edw. IV. c. 1. no person shall melt down any money of gold or silver sufficient to run in payment, upon pain of forfeiture of the value: and by 13 and 14 Car. II. c. 31. melting down any current silver money of the realm is to be punished with forfeiture of the same, and double the value; and if done by a freeman of a town, with disfranchisement; if by any other person, with six months' imprisonment. And if money, false or clipped, be found in the hands of any that is suspicious, he may be imprisoned till he hath found his warrant *per statutum de monetâ*. (*b*)

Melting coin.

Evidence.

It was agreed by all the judges, that one witness was sufficient in clipping as well as counterfeiting the coin; though it appeared that the opinion and practice had once been otherwise in the case of clipping. (*c*)

(*a*) To be recovered as directed in the act.

(*b*) 3 Inst. 18.

(*c*) 1 East. P. C. c. 2. s. 64. p. 129.

SECT. III.

OF IMPORTING INTO THE KINGDOM COUNTERFEIT OR LIGHT MONEY.

Importing counterfeit money of England.

THE statute 25 Edw. III. st. 5. c. 2. enacts, that "if a "man bring false money into this realm, *counterfeit to the* "*money of England*, as the money called Lushburg, or "other like to the said money of England, knowing the "money to be false, to merchandise or make payment, in "deceit of our said lord the king and his people," it shall be high treason.

Importing foreign coin current here.

By the statute 1 and 2 Ph. and M. c. 11. it is enacted, that "if any person shall bring from parts beyond the sea "into this realm, or into any of the dominions of the same, "*any false or counterfeit coin or money being current within* "*this realm* as aforesaid, knowing the same coin or money to be "false and counterfeit, to the intent to utter or make payment "with the same within this realm, or any the dominions of "the same, by merchandizing or otherwise; such offenders, "their counsellors, procurers, aiders, and abettors, shall, "on conviction or attainder, be deemed traitors." The words, current within this realm, refer to gold and silver coin of foreign realms, current here by the sufferance and consent of the crown, which must be by proclamation, or by writ under the great seal. And the money, the bringing in of which is prohibited by these statutes, must be brought from some foreign place out of the king's dominions into some place within the same. (*d*) It may be observed also, that these acts are confined to the *importer*, and do not extend to a *receiver* at second hand; and such importer must also be averred and proved to have known that the money was counterfeit. (*e*)

It seems to be the better opinion, that it is not necessary

(*d*) 1 East. P. C. c. 4. s. 1, 4, 5, 6, 21, 22.

(*e*) 1 Hale 227, 228. 317. 1 Hawk. c. 17. s. 86. 88. 1 East. P. C. c. 4. s. 22. p. 175.

that such false money be actually paid away or merchandized with, for the words of the statute 25 Edw. III. are to "merchandize or make payment, &c." which only import an *intention* to do so, and are fully satisfied whether the act intended be performed or not: (*f*) and it is clear, that bringing over money counterfeited according to the similitude of foreign coin, is treason within 1 and 2 Ph. and M. c. 11. (*g*)

Importing gold or silver foreign coin not current.

The 37 Geo. III. c. 126. recites, that the practice of bringing into the realm, and uttering within the same, *false and counterfeit foreign gold and silver coin*, and particularly pieces of gold coin commonly called louis d'or, and pieces of silver coin commonly called dollars, had of late greatly increased, and that it was expedient that provision should be made more effectually to prevent the same; and then enacts, that "if any person or persons shall bring into "this realm any such false or counterfeit coin as aforesaid, (namely, the coin described in sect. 2. as "any kind of coin "not the proper coin of this realm, nor permitted to be "current within the same") resembling, or made with in- "tent to resemble, or look like any gold or silver coin of "any foreign prince, state, or country, or to pass as such "foreign coin, knowing the same to be false or counter- "feit, *to the intent to utter* the same within this realm, or "within any dominions of the same; every such person "shall be deemed guilty of felony, and may be transported "for any term of years not exceeding seven." Accessories before are not mentioned in this statute: there may however be such accessories, as they are incident to every felony; but it is doubted whether they are liable to the punishment of transportation. (*h*) From the words of the statute, an

(*f*) 1 Hawk. c. 17. s. 89. But Lord Coke and Lord Hale seem to have thought differently. 3 Inst. 18. 1 Hale 229. But see 1 East. P. C. c. 4. s. 22. p. 175, 176. where it is said, that though the best trial and proof of an intent be, by the act done, yet it may also be evinced by a variety of circumstances, of which the jury are to judge. At any rate such intent must be averred in the indictment.

(*g*) 1 Hawk. c. 17. s. 89.

(*h*) See *ante*, 86, note (r), and 79,

importation *with intent to utter* is clearly sufficient, without any actual uttering. The intent must be collected from circumstances; and though an actual uttering may be the best evidence of such intent, it is said to be safest that the indictment should follow the words of the statute. (*i*) It seems that this statute does not provide for the case of a person collecting the base money therein mentioned, from the venders of it in this country, with intent to utter it within the realm, or the dominions of the realm. (*k*)

Of importing light silver coin.

Considerable quantities of old silver coin of the realm, or coin purporting to be such, below the standard of the mint in weight, were formerly imported, to the public detriment at that time; in consequence of which the 14 Geo. III. c. 42, prohibited the bringing into the kingdom any such coin, and provided that if any silver coin being or purporting to be the coin of this realm, exceeding in amount the sum of five pounds, should be found by any officer of his Majesty's customs on board any ship, &c. or in the custody of any person coming directly from the water side; or upon the information of one or more persons, in any house or other place on search there made in the manner directed by a statute of 14 Car. II., the officer might seize the same; and if upon examination it should appear to be of the standard weight, it should be restored; but if it should be less in weight than the standard of the mint, that is to say, at and after the rate of sixty-two shillings to every pound troy, it should be forfeited. This act was revived and made perpetual by 39 Geo. III. c. 75: but the recent act 56 Geo. III. c. 68. s. 2, enacts that so much of the 14 Geo. III. c. 42, as enacts that any silver coin of the realm less in weight than after the rate of sixty-two shillings for every pound troy shall be forfeited, and of any act or acts for reviving or continuing or making perpetual the provisions of the said act, in this respect, shall from the passing of that act be repealed.

note (u), and 1 East, P. C. c. 4. s. 23. p. 176.

(*i*) 1 East. P. C. c. 4. s. 23. p. 176

(*k*) 1 East. P. C. c. 4. s. 23. p. 177.

SECT. IV.

OF EXPORTING COUNTERFEIT MONEY.

Of sending counterfeit coin, &c. out of the kingdom for the purpose of its being imported into the British colonies in America, or the West Indies.

THE statute 38 Geo. III. c. 67. s. 1, enacts that "All "copper coin whatsoever, not being the legal copper coin "of this kingdom, and all counterfeit gold or silver coin, "made to the similitude or resemblance, or intended to re- "semble, any gold or silver coin either of this kingdom or "of any other country, which shall under any pretence, "name, or description whatsoever, be exported or shipped, "or laden or put on board any ship, vessel, or boat, for the "purpose of being exported from this kingdom to the island "of Martinique in the West Indies, or any of his Majesty's "islands or colonies, in the West Indies, or America, shall "be forfeited," &c. And the second section enacts that "every person who shall so export, or ship, lay, or put on "board any ship, vessel, or boat, in order to be so exported, "or cause to be shipped, &c. or shall have in their custody, "in order to be so exported, any such coin as aforesaid, "shall forfeit £200, and double the value of such coin to "be recovered by bill, suit, action, or information, in any "court of record at Westminster."

SECT. V.

OF THE JUDGMENT IN CASES OF TREASON RESPECTING THE COIN.

IN all cases of treason respecting the coin whether newly created such or not, and so in petty treason, the judgment is only to be drawn on a hurdle and hanged; for that was the judgment before the statute 25 Ed. III. st. 5. c. 2, and was not intended to be altered thereby: and these being all offences in pari materiâ, and auxiliary to the original law, have the same judgment. (*l*)

(*l*) 1 East. P. C. c. 2. s. 70. p. 138.

CHAPTER THE SECOND.

Of Frauds relating to Bullion, and of counterfeiting Bullion.

SECT. I.

OF FRAUDS RELATING TO BULLION.

BULLION signifies properly either gold or silver in the mass; but is sometimes used to denote those metals in any state other than that of authenticated coin; comprising in this latter sense gold and silver wares and manufactures. Many statutes have been passed for the prevention of frauds with respect to such bullion by creating offences in making, working, putting to sale, exchanging, selling, or exporting, any gold or silver manufactures of less fineness than the standards respectively fixed at the time by the several acts. But it is not intended to make any particular mention of those statutes; (*a*) the punishments inflicted by them being in general certain penalties and forfeitures, or, in default of payment, commitment to the house of correction. It should be observed, however, that the statute 28 Ed. I. st. 3. c. 20, is still in force, which prohibits any goldsmith from making any vessel or other thing of gold or silver, except it be of good and true alloy, namely, gold not worse than the touch of Paris, and silver of sterling alloy or better; and provides that all silver vessels shall be assayed by the wardens of the goldsmiths' company, and marked with the leopard's head. The punishment of a goldsmith so offending against this act is imprisonment and ransom at the king's pleasure; and, as the statute is a prohibitory law, the proper remedy

Making gold and silver wares under the true alloy.

(*a*) See them collected in 1 East. P. C. c. 4. s. 32. p. 188 to 194.

under it is by indictment. (*b*) Though the description of the offence in this statute is not so large as in the subsequent statutes, it has been held that it is not repealed by any of the subsequent statutes against the same offence, but that they only add accumulative penalties. (*c*) But the knowingly exposing to sale and selling wrought gold under the sterling alloy for gold of the true standard, though indictable in *goldsmiths*, is a private imposition only in a *common person*, and the party injured is left to his civil remedy. (*d*)

Fraudulently affixing marks indictable at common law.

It is conceived also that offenders fraudulently affixing public and authentic marks on goods of a value inferior to such tokens are liable to suffer at common law upon an indictment for a cheat. Joseph Fabian, a working goldsmith, was indicted for falsifying plate, by putting in too much alloy, and then corrupting one of the assay master's servants to help him to the proper marks, with which he stamped his plate, and sold it to the goldsmiths; and being convicted, he was fined £100, and adjudged to stand three times in the pillory; and was also forejudged of his trade that he should not use that trade again as a master workman. This judgment must have been at common law. (*e*)

The offences of counterfeiting the assay marks on bullion or plate, or transposing such marks from one piece of manufacture to another, will be mentioned in a subsequent part of the work.

Of frauds in the exportation of bullion.

It was provided by the stat. 15 Car. II. c. 7. s. 12, that any person might *export* any foreign coin or bullion duty free, first making an entry thereof at the custom-house: but under colour of this regulation it was found that English money or wrought plate had been melted down into the

(*b*) By Lord Mansfield in Rex v. Jackson, Cowp. 297.

(*c*) Rex v. Jackson, Cowp. 297. 1 East. P. C. c. 4. s. 34. p. 194.

(*d*) Rex v. Bower, Cowp. 323.

(*e*) Fabian's case, Old Bailey, Dec. Sess. 1664. 1 East. P. C. c. 4. s. 34. p. 194. Kel. 39.

form of foreign coin or bullion for the purpose of exportation. The statute 6 & 7 W. III. c. 17, and the 7 & 8 W. III. c. 19. s. 6, contain some enactments for the prevention of this evil. The 6 & 7 W. III. c. 17, prohibits making ingots or bars of silver in imitation of Spanish bars or ingots, (*f*) and enacts that no person shall export molten silver, unless stamped at goldsmiths' hall, or without a certificate from one of the wardens of the goldsmiths' company that oath has been made of the same being lawful silver, and that no part thereof was (before it was molten) the current coin of the realm, nor clippings thereof, nor plate wrought within this kingdom. (*g*) The 7 & 8 W. III. c. 19. s. 6, provides that no person shall ship, &c. any molten silver, or bullion, unless a certificate be first obtained from the court of the Lord Mayor and Aldermen of London, oath having been made before the court by the owners and two witnesses that the same was and is foreign bullion, and that no part thereof was the coin of the realm, or the clippings thereof, nor plate wrought within this kingdom, &c.; and that such oath shall be circumstantially certified by the said court to the commissioners of the customs, before any cocket shall be granted for shipping the same. The regulations of these statutes are enforced in most instances by pecuniary penalties and forfeitures. Some alteration, however, has been made in them by a recent statute 43 Geo. III. c. 49, which reciting that the East India company and others may be possessed of large quantities of foreign molten silver or bullion, brought from parts beyond the seas, and not be able to prove that no part of it was coin of the realm or clippings, nor plate wrought within Great Britain, so as to obtain the necessary certificates for the exportation of it, enacts that the treasury may grant licences for the exportation of molten silver or bullion, and that persons so licensed may export bullion without the usual certificate.

(*f*) S. 3.

(*g*) S. 5. Other provisions as to the seizure of molten silver or bullion are contained in s. 6, 12, and 14.

Brokers prohibited from buying and selling bullion.

The same statute of 6 & 7 W. III. c. 17, enacts also (*h*) that "if any broker, not being a trading goldsmith or refiner of silver, shall buy or sell any bullion or molten silver, he shall suffer imprisonment for six months without bail," a regulation which is supposed to have been intended to prevent gambling speculations which might enhance the price of the precious metals. (*i*)

SECT. II.

OF COUNTERFEITING BULLION.

Blanching copper, &c.

THE statute 8 & 9 W. III. c. 26. s. 6, reciting that several mixtures of metals had been invented in imitation of gold and silver, and that blanched copper was principally made use of in imitation of silver, and seldom if ever for any honest or good purpose, enacts "that if any person shall blanch copper for sale, or mix blanched copper with silver, or knowingly buy or sell or offer to sale blanched copper alone or mixed with silver, or shall knowingly and fraudulently buy or sell or offer to sale any malleable composition, or mixture of metals, or minerals, which shall be heavier than silver, and look and touch and wear like standard gold, but be manifestly worse than the standard," such person shall be adjudged guilty of felony, and being thereof convicted or attainted shall suffer death. (*k*)

(*h*) S. 7.

(*i*) 1 East. P. C. c. 4. s. 37. p. 196.

(*k*) The seventh section provides that there shall be no corruption of blood or forfeiture of dower: and by the ninth section no prosecution is to be made unless commenced within three months after the offence committed. This statute is made perpetual by 7 Ann. c. 25. s. 3.

CHAPTER THE THIRD.

Of the making, mending, or having in possession any Instruments for Coining.

THE statute 8 and 9 Wm. III. c. 26. s. 1. enacts, that " no smith, engraver, founder, or other person or persons " whatsoever (other than and except the persons employed, " or to be employed in or for his Majesty's mint or mints " in the tower of London or elsewhere, and for the use and " service of the said mints only, or persons lawfully autho- " rised by the lords commissioners of the treasury, or lord " high treasurer of England for the time being) (*a*) shall " knowingly *make or mend*, or begin or proceed to make or " mend, or assist in the making or mending of any *puncheon*, " *counter-puncheon*, *matrix*, *stamp*, *dye*, *pattern*, *or mould* " of steel, iron, silver, or other metal or metals, or of " spaud or fine founders' earth or sand, or of any other " materials whatsoever, in or upon which there shall be, or " be made or impressed, or which will make or impress the " figure, stamp, resemblance, or similitude of both or either " of the sides or flats of any gold or silver coin current " within this kingdom; *nor* shall knowingly *make or mend*, " or begin or proceed to make or mend, or assist in the

Making, mending, or having in possession coining instruments, high treason.

(*a*) It was holden by all the judges, about Hilary term, 13 W. III. that it ought to be averred in an indictment on this statute that the party was not employed in the mint, or authorised by the treasurer, &c. 1 East. P. C. c. 4. s. 15. where it is stated that the question was moved before Mr. Justice Turton, who had convicted one upon this statute at York upon an indictment which had not such an averment; and for this reason it was holden bad, and that the prisoner ought to be tried again; which was done at the Lent Assizes, 1702, before Powis, J. when the prisoner was attainted and executed.

" making or mending, of *any edger or edging tool, instru-*
" *ment or engine*, not of common use in any trade, but con-
" trived for marking (*b*) of money round the edges with
" letters, grainings, or other marks or figures resembling
" those on the edges of money coined in his Majesty's mint,
" *nor any press for coinage, nor any cutting engine* for cut-
" ting round blanks by force of a screw out of flatted bars
" of gold, silver, or other metal; *nor* shall knowingly *buy*
" *or sell, hide or conceal*, or without lawful authority or
" sufficient excuse for that purpose knowingly *have in his,*
" *her, or their houses, custody or possession, any such pun-*
" *cheon, counter-puncheon, matrix, stamp, dye, edger, cutting*
" *engine, or other tool or instrument before mentioned.*"
And every such offender and offenders, their counsellors, procurers, aiders and abettors, shall be guilty of high treason, and being thereof convicted or attainted shall suffer death, as in case of high treason.

Conveying out of the mint any puncheon, &c. high treason;

The second section of the same statute creates another offence, and enacts, " that if any person shall, without law-
" ful authority for that purpose, wittingly or knowingly *con-*
" *vey*, or assist in the conveying *out of his Majesty's mint*
" in the tower of London, or out of any other of his Ma-
" jesty's mints, *any puncheon, counter-puncheon, matrix,*
" *dye, stamp, edger, cutting engine, press, or other tool, en-*
" *gine, or instrument*, used for or about the coining of
" monies, there, or any useful part of such tools or in-
" struments," such offenders, their counsellors, procurers, aiders or abettors, as also all and every person and persons knowingly receiving, hiding, or concealing the same, shall be adjudged guilty of high treason, and being convicted or attainted thereof, shall suffer death, as in case of high treason.

And receiving, hiding, &c. the same, also high treason.

(*b*) The word is " *making*" in the black letter fo. copy of the statutes, and Mr. East has so copied the word (1 East. P. C. c. 4. s. 16. p. 167) adding in the margin " quære a misprint in the printed statute for marking." In the octavo edition of the statutes, by *Pickering*, the word is *marking*, as in the text.

This statute was only temporary, but afterwards made perpetual by 7 Ann. c. 25. s. 1. and by the second section of that statute the prosecution of such as offend by making or mending, or beginning or proceeding to make or mend any coining tool, or instrument therein prohibited, may be commenced within *six months* after such offence committed. The act of W. III. provided that no prosecution should be made for any offence against that act, unless such prosecution should be commenced within three months (*c*) after such offence committed.

Prosecution within six months.

Several points have arisen as to the tools or instruments which are to be considered as within the words of the statute 8 & 9 W. III.

In one case the prisoner was indicted for *having in his custody a press for coinage* without any lawful authority, &c. One of the questions raised was, whether a press for coinage was one of the tools or instruments within that clause of the act on which the indictment was founded: and a majority of the judges held that it was. (*d*) In another case the prisoner was indicted for *having in his custody and possession*, without any lawful or sufficient excuse, one *mould made of lead*, on which was made and impressed the figure, stamp, resemblance, and similitude of one of the sides or flats of a shilling, viz. the head side of a shilling: and the prisoner being convicted, it was submitted to the judges, whether the mould found in the prisoner's custody was comprised under the general words "*other tool or instrument before mentioned*," so as to make the unlawful custody of it high treason; and also whether, if it were so comprised, it should not have been laid

Having possession of a *press for coinage*, or a *mould*, is within 8 & 9 W. III. c. 26.

(*c*) Vide Willace's case, *ante*, p. 76, note (*l*) and *post* 109, note (*h*).

(*d*) Bell's case, Fost. 430. In this case the suffering the defendant to be convicted of high treason, subject to the opinion of the judges, instead of directing a special verdict, which ought to have been done, was much censured amongst the judges, and also by Lord Hardwicke, when the defendant's pardon came to the great seal.

in the indictment to be *a tool or instrument* in the words of the act. And the judges were unanimously of opinion, that this mould was a tool or instrument mentioned in the former part of the statute, and therefore comprised under these general words; and that as a mould is expressly mentioned by name in the first clause of the act which respects the making or mending, it need not be averred to be a tool or instrument so mentioned. (*e*)

What shall be considered a *puncheon* within the meaning of the statutes.

A case has also been decided as to *what shall be considered a puncheon* within the meaning of this statute. The prisoner was indicted for having in his custody and possession a puncheon made of iron and steel in and upon which was made and impressed the figure, resemblance, and similitude of the head side of a shilling without any lawful authority, &c. It was fully proved that several puncheons were found in the prisoner's lodgings, together with a quantity of counterfeit money, and that he had them knowingly for the purposes of coining: but the opinion of the judges was taken as to the

(*e*) Lennard's case, 1 Leach 90. 1 East. P. C. c. 4. s. 17. p. 170. Another point was afterwards raised in this case upon the form of the indictment. The doubt was, whether the mould, which was found in the prisoner's custody, it having only the resemblance of a shilling *inverted*, viz. the convex parts of the shilling being concave in the mould, and *vice versâ*, the head or profile being turned the contrary way of the coin, and all the letters of the inscription reversed, was not properly an instrument which *would make and impress* the resemblance, stamp, &c. rather than an instrument on which the same *were made and impressed*, as laid in this indictment, the statute seeming to distinguish between such as *will make and impress* the similitude, &c. as the matrix, die, and mould; and such on which the same *is made and impressed*, as a puncheon, counter-puncheon, or pattern. But a great majority of the judges were of opinion that this evidence sufficiently maintained the indictment; because *the stamp* of the current coin was certainly impressed on the mould in order to form the cavities thereof. They agreed, however, that the indictment would have been more accurate had it charged that "he had in his cus-"tody a mould that *would make* "*and impress* the similitude, &c." and in this opinion some, who otherwise doubted, acquiesced.

point, whether the puncheon in question was or was not a puncheon within the meaning of the legislature, upon the following evidence of the engraver of the mint.

The puncheons found in the prisoner's custody were complete and hardened ready for use; but it was impossible to say that the shillings which were found were actually made with these puncheons, the impressions being too faint to be exactly compared; but they had the appearance of having been made with them. That the manner of making these puncheons is as follows: a true shilling is cut away to the outline of the head; that outline is fixed on a piece of steel, which is filed or cut close to the outline; and this makes the puncheon; that the puncheon makes the die, which is the counter-puncheon; that a puncheon is complete without letters, but it may be made with letters upon it; though from the difficulty and inconvenience it is never so made at the mint; but after the die is struck, the letters are engraved on it; that a puncheon alone, without the counter-puncheon, will not make the figure; but to make an old shilling or a base shilling current, nothing more is necessary than the instrument now produced. They may be used for other purposes, such as making seals, buttons, medals, or other things, where such impressions are wanted.

Eleven of the judges (*absente* Ld. C. J. De Grey) were unanimously of opinion that this was *a puncheon* within the meaning of the act, for the word "puncheon" is expressly mentioned in the statutes, and will, by the means of the counter-puncheon or matrix, "make or impress the *figure*; "*stamp, resemblance, or similitude of the current coin*;" and these words do not mean an exact figure, but if the instrument impress a resemblance in fact, such as will impose on the world, it is sufficient, whether the letters are apparent on the puncheon or not; otherwise the act would be quite evaded, for the letters would be omitted on purpose. The puncheon in question was one to impress the head of king William; and the shillings of his reign, though the letters

are worn out, are current coin of the kingdom. The puncheon made an impression like them, and the coin stamped with it would resemble them on the head side, though there were no letters. This was compared to the case mentioned by Sir Matthew Hale, (*f*) that the omission or addition of words in the inscription of the true seals for the purpose of evading the law would not alter the case. (*g*)

Having a tool or instrument in possession for the purpose of coining *foreign gold coin*, is not within 8 & 9 W. III. c. 26. *Sed qu.*

It has been decided that having a tool or instrument (of such sort as is included in that branch of the stat. 8 and 9 W. III. c. 26. which makes it treason to have the same knowingly in the party's custody) in possession *for the purpose of coining foreign gold coin not current here*, is not within the statute. A majority of the judges considered that this act was only intended to prevent the counterfeiting the current coin of this kingdom, and not foreign coin. But Lord C. J. Ryder, and Mr. J. Foster dissented: considering that the act, though principally levelled against counterfeiters of the current coin of the kingdom, was not confined solely to that object. That the intention of the legislature was to keep out of private hands, as far as possible, all means of counterfeiting the coin; and therefore make it high treason to be knowingly possessed of such instruments, in fact, without lawful authority or sufficient excuse. That it was therefore incumbent on the defendant to shew such lawful authority or sufficient excuse. But that, supposing his mere intention to be an ingredient in the case, the intention found of using the tool or instrument in question for the purpose stated did not amount to a sufficient excuse; and upon the fullest consideration afterwards Mr. Justice Foster was of opinion that the case did fall within the act; in which opinion it appears that Lord Hardwicke fully concurred. (*h*)

(*f*) 1 Hale 184. 2 Hale 212, 215. Robinson's case, 2 Roll. Rep. 50. 1 East. P. C. c. 2. s. 25. p. 86.

(*g*) Ridgelay's case, 1 Leach 189. 1 East. P. C. c. 4. s. 18. p. 171.

(*h*) Bell's case, 1 East. P. C. c. 4. s. 17. p. 169, 170. Fost. 430. and Preface to the third edition of Fost. p. 8.

It was agreed by all the judges, that in proceedings upon this statute 8 and 9 W. III. c. 26. it is not necessary to prove that money was actually made with the instrument in question. (*i*)

It is not necessary to prove money made with the instrument.

The having tools for coining in possession, with intent to use them, has been held to be a misdemeanor at *common law*. An indictment, which was framed as for a misdemeanor at common law, charged that the defendant, without any lawful authority, had in his custody and possession two iron stamps, each of which would make and impress the figure, resemblance, and similitude of one of the sceptres impressed upon the current gold coin of this kingdom, called half guineas, with intent to make the impression of sceptres on divers pieces of silver coin of this realm, called sixpences, and to colour such pieces of the colour of gold, and fraudulently to utter them to his Majesty's subjects as lawful half guineas, against the peace, &c. Lord Hardwicke, at the assizes, doubted whether the bare possession was unlawful, unless made use of, or unless made criminal by statute: but upon the indictment being removed into the Court of King's Bench by certiorari, (*k*) Page, Probyn, and Lee, justices, held, that the bare having such instruments in possession, with the intent charged, was a misdemeanor. (*l*)

Having tools for coining in possession, with intent to use them, is a misdemeanor at common law.

It seems that the degree of similitude to the real coin which the tools or instruments must be capable of impressing in order to bring the case within the statute 8 and 9 W. III. c. 26. must be governed by considerations similar to those which have been stated with respect to the counterfeit coin itself. (*m*) Whether the instrument in question be calculated to impress the figure, stamp, resemblance, or similitude of the coin current is a question for the jury:

The tool or instrument need not bear an exact resemblance to the coin.

(*i*) Ridgelay's case, 1 East. P. C. c. 4. s. 18. p. 172.

(*k*) The defendant was brought up by Habeas Corpus, and committed to *Newgate*.

(*l*) Rex *v.* Sutton, Rep. temp. Hardw. 370. *Ante*, Book I. Ch. 3. p. 63.

(*m*) *Ante*, p. 80. *et sequ.*

and it is clear, that the offence is not confined to an *exact imitation* of the original and proper effigies of the coin. (*n*)

Seizing tools, &c. to produce in evidence.

The 8 and 9 W. III. c. 26. s. 5. enacts, that "if any "puncheon, die, stamp, edger, cutting engine, press, flask, "or other tool, instrument, or engine, used or designed for "coining or counterfeiting gold or silver money, or any "part of such tool or engine, shall be hid or concealed in "any place, or found in the house, custody, or possession of "any person, not then employed in the coining of money in "some of his Majesty's mints, nor having the same by some "lawful authority, then any person discovering the same "may seize and carry them forthwith to some justice of "peace of the county or place, to be produced in evidence "at the trial of the offender;" and further provides, that they shall afterwards be defaced and destroyed by order of the Court.

(*n*) 1 East. P. C. c. 4. s. 18. p. 171.

CHAPTER THE FOURTH.

Of receiving, uttering, or tendering counterfeit Coin.

In some cases treason.

IN some cases the putting off counterfeit money may amount to *treason:* as if A. counterfeit the gold or silver coin current, and by agreement before that counterfeiting B. is to take off and vend the counterfeit money, B. is an aider and abettor to such counterfeiting, and consequently a principal traitor within the law. (*a*) And in the case of the copper coin, B. acting a similar part will be an accessory before the fact to the felony, within the statute 11 Geo. III. c. 40. (*b*) And if B., knowing that A. hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be as a receiver of A. because he maintains him. And if B. know that A. counterfeited the money, and conceal his knowledge, though he neither receive, maintain, nor abet A. he will be guilty of misprision of treason. (*c*)

Cheat and misdemeanor.

If A. counterfeit money, and B. knowing the money to be counterfeit vent the same for his own benefit, B. is neither guilty of treason, nor misprision of treason. But he may be proceeded against under the provisions of the 15 Geo. II. c. 28. which will be presently noticed, before which statute he was only liable to be punished as for a cheat and misdemeanor. (*d*) And upon the principles which have

(*a*) 1 Hale 214.
(*b*) 1 East. P. C. c. 4. s. 26. p. 178.
(*c*) 1 Hale 214.
(*d*) 1 East. P. C. c. 4. s. 26. p. 179. 1 Hale 214. See precedents of indictments for a misdemeanor at common law in uttering a counterfeit half guinea, Cro. Circ. Comp. 315. (7th Ed.) Starkie 466. 2 Chit. Crim. Law, 116. See also a precedent of an indictment for a misdemeanor at common law, against a

been mentioned in a former part of this work, (*e*) the unlawful procuring of counterfeit coin with *intent to circulate* it, though no act of uttering be proved, is a misdemeanor; and the possession of counterfeit coin unaccounted for was held to be evidence of an unlawful procurement with intent to circulate. (*f*) But the uttering and tendering in payment counterfeit *copper* money has been held not to be an indictable offence. (*g*)

Statutes.

But the receiving, uttering, or tendering in payment counterfeit money, have been made the subject of legislative provision by several statutes. I. By the 8 and 9 W. III. c. 26. 11 Geo. III. c. 40. and 15 Geo. II. c. 28. relating to the *coin of the realm;* and, II. By the 37 Geo. III. c. 126. relating to *foreign coin.*

man for uttering a counterfeit sixpence, and having another found in his custody, Cro. Circ. Comp. 315. (7th Ed.) 2 Chit. Crim. Law, 117. The uttering of false money, knowing it to be false, is mentioned as a misdemeanor in the recital to the 15 Geo. II. c. 28. s. 2. There is also a precedent for a misdemeanor at common law, in uttering, and causing to be uttered, guineas filed and diminished as good guineas. Cro. Circ. Comp. 317. (7th Ed.) and 2 Chit. Crim. Law, 116. and also a precedent for a misdemeanor at common law in selling counterfeit Dutch guilders. Cro. Circ Comp. 313. (7th Ed.) 2 Chit. Crim. Law, 119, 120.

(*e*) *Ante*, Book I. Chap. III. p. 61, 63.

(*f*) Stewart's case, *Bodmin.* Sum. Ass. 1814, before Gibbs, C. J. reserved by him and decided by the judges in Mich. T. 1814. MS. The possession in this case was under particularly suspicious circumstances; the coin being newly finished, all of it appearing to be of the same make, and not to have been in circulation. The marginal note to Parker's case, 1 Leach 41. states, that "having the possession of counterfeit money, "with intention to pay it away as "and for good money, is an indictable offence at common law." This may perhaps be law in certain instances of such *possession:* but *qu.* if the point stated in the marginal note was actually decided in Parker's case.

(*g*) Cirwan's case, *Oxford* Sum. Assiz. 1794, MS. Jud. 1 East. P. C. c. 4. s. 28. p. 182. The defendant was indicted for "unlawfully uttering and tendering in payment "to J. H. ten counterfeit half-pence, knowing them to be "counterfeit." Upon reference to the judges, this was held not to be an indictable offence.

SECT. I.

OF RECEIVING, PAYING, PUTTING-OFF, &c. COUNTERFEIT COIN OF THE REALM.

8 & 9 W. III. c. 26. s. 6. (made perpetual by 7 Ann. c. 25. s. 3.) as to receiving, paying, or putting-off, &c.

I. The statute 8 and 9 W. III. c. 26. s. 6. enacts, that "if any person shall take, receive, pay, or put off, any counterfeit milled money, or any milled money whatsoever, unlawfully diminished and not cut in pieces, at or for a lower rate *or value* than the same by its denomination doth or shall import, or was coined or counterfeited for, he shall be guilty of felony." The seventh section saves the corruption of blood; and by section 9. no prosecution is to be made for any offence against this act, unless it be commenced within three months after the offence committed. (*h*) The act was at first only temporary, but was made perpetual by 7 Ann. c. 25. s. 3.

What shall be considered as a *putting-off* counterfeit money within 8 & 9 W. III. c. 26.

Under this statute there must be *an actual passing* or getting rid of the money, and not merely an attempt to do so. In a case at the Old Bailey, in the year 1784, a question was raised upon this point. It appeared in evidence that the prisoner had carried a large quantity of counterfeit shillings to the house of a Mrs. Levey, which she agreed to receive from him, and which he agreed to put off to her at the rate of twenty-nine shillings for every guinea. In pursuance of this bargain, the prisoner laid a heap of counterfeit shillings on a table, and Mrs. Levey proceeded to count them out at the rate beforementioned: and had counted out three parcels, containing eighty-seven counterfeit shillings, for which she was to pay the prisoner three guineas; but before she had paid him, and while the counterfeit money lay there

(*h*) But the proceedings before a magistrate, and not the preferring the indictment, will be considered as the commencement of the prosecution, as in Willace's case, *ante*, 76, note (*l*). S. P. ruled by Le Blanc, J. *Stafford* Sum. Ass. 1812, in Barker's case, who was indicted under this statute, for putting off counterfeit milled money. The prisoner had been in gaol upwards of three months before the assizes.

exposed upon the table, the officers of justice entered the room and apprehended them. Mrs. Levey was admitted as a witness for the crown; and swore that she had bought the three parcels of shillings, and was going to pay the prisoner three guineas for them at the moment they were detected. This was ruled not to be a completion of the offence charged, and the prisoner was acquitted. (*i*)

The meaning of *milled money* within this statute.

A case has also been decided upon the meaning of "*milled money*" in this statute. The prisoner was indicted for putting off to one J. P. nine pieces of false and counterfeit milled money and coin, each counterfeited to the likeness of a piece of legal and current milled money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by the denomination import, and were counterfeited for; *i. e.* at so much, &c. The fact of knowingly putting off the shillings at a lower value than according to their denomination, was fully proved; but there was no appearance of milling on them; and it was proved, by officers from the Mint, that this money never had been milled, nor any attempt made to counterfeit on them the milling which is always put on the shillings coined at the Tower. Upon this the prisoner's counsel contended, that the evidence did not prove the offence as described in the statute, or charged in the indictment, but directly the contrary, as it proved that the money illegally put off was not milled. The case was reserved for the opinion of the judges; who thought that the expression "*milled money*" could not have any reference whatever to the *edging* which is put on real and lawful coin, and which is properly termed *graining*. That the money-coin at the Mint in the Tower is milled money before it is edged, that is, before those marks, which had been falsely imagined to constitute milled money, are put upon it; for that all current money is passed through a mill or press to make the plate out of which it is cut of a proper thickness; and that from this

(*i*) Wooldridge's case, 1 Leach 307. 1 East. P. C. c. 4. s. 27. p. 179.

process it receives its denomination of *milled money*, and not, as generally but erroneously imagined, from the grainings on its edges. The judges, therefore, thought it unnecessary that the counterfeit money should appear to have been milled: for considering *milled money* as one word, (as if written with a hyphen,) and descriptive of the money now current, if the counterfeit resemble the money which, if genuine, would have been milled, it is enough. (*k*)

The money must be vented at a lower value, &c.

It is necessary, in order to bring a case within this statute, that the money be vented at a *lower value* than the coin imports, and that it should be so stated in the indictment. (*l*) And if the names of the persons to whom the money was put off can be ascertained, they ought to be mentioned, and laid severally in the indictment; but if they cannot be ascertained, the same rule will apply as prevails in the case of stealing the property of persons unknown. (*m*)

Names of persons to whom put off to be stated.

The indictment must charge that the money was unlawfully diminished.

If the indictment be for putting off diminished money at a lower rate, it must be averred that it was *unlawfully* diminished. (*n*) And it has been held, that an indictment upon this statute was bad, for omitting to state that the

(*k*) Bunning's case, Old Bailey, 1794. 2 Leach 624. 1 East. P. C. c. 4. s. 27. p. 180. The case of Hannah Dorrington, and the case of Jacobs and Lazarus, were considered by the judges at the same time, and being precisely similar, were disposed of by the like resolution. It seems that milled money was so called to distinguish it from hammered money, which was prohibited by 9 W. III. c. 2. Mr. East says (p. 180. note (a)) that he had been informed that there had been no hammered money since the time of Car. II.

(*l*) 1 East. P. C. c. 4. s. 27. p. 180.

(*m*) 1 East. P. C. c. 4. s. 27. p. 180. citing a case from MS. Tracy, of a woman who was indicted at the Old Bailey, 1702, for putting off ten pieces of counterfeit gilt money like guineas, to divers persons unknown; Holt, C. J. said, that the names of the persons ought to be mentioned and laid severally; yet he tried the prisoner, and she was convicted. Probably the names of the persons to whom the money was put off could not be ascertained.

(*n*) 5 T. R. 217. note (a) to the case of Tooke *v.* Hollingworth. The coin might be diminished by reasonable wearing.

And it should be stated that the money was "not cut in pieces."

counterfeit money was "*not cut in pieces*," as those words are a material part of the description of the offence. (*o*)

11 Geo. III. c. 40. s. 2. receiving, paying, or putting off counterfeit *copper* coin.

This statute, mentioning "counterfeit *money*" generally, has been considered as confined to gold or silver coin: (*p*) but with respect to *copper coin*, it is enacted by 11 Geo. III. c. 40. s. 2. that if any person "shall buy, sell, take, receive, "pay, or put off, any counterfeit copper coin, not melted "down or cut in pieces, at or for a lower rate or value than "the same by its denomination imports, or was counterfeited "for, he shall be adjudged guilty of felony."

Punishment.

The punishment under these statutes of 8 and 9 W. III. and 11 Geo. III. was originally burning in the hand, and imprisonment not exceeding a year, under the statute 18 Eliz. c. 7. s. 3.: (*q*) but the punishment of burning in the hand is abolished by 19 Geo. III. c. 74. s. 3. (*r*) and in lieu thereof the offender is subjected to a moderate fine or whipping, at the discretion of the Court. (*s*)

The statute 8 and 9 W. III. relating only to the putting off counterfeit money at a lower rate or value than that imported by its denomination, the offence of *uttering* such money in the course of traffic was punishable only as a misdemeanor, until, from its becoming very frequent, it was thought proper to subject it to more severe punishment.

15 Geo. II. c. 28. s. 2. as to *uttering* or tendering in payment counterfeit money.

The statute 15 Geo. II. c. 28. s. 2, enacts "that if any "person shall *utter or tender in payment* any false or coun- "terfeit money, knowing the same to be false or counterfeit, "to any person or persons," and shall be thereof convicted, he shall suffer six months imprisonment, and find sureties

(*o*) Palmer's case, 1 Leach 102.

(*p*) 1 East. P. C. c. 4. s. 1, 9, 27.

(*q*) 1 East. P. C. c. 4. s. 27. citing Rex v. West and others, Old Bailey, Sept. 1780. 1 MS. Sum. 91.

(*r*) This act was originally temporary, but continued by several acts, and afterwards made perpetual by 39 Geo. III. c. 45.

(*s*) See this statute more at large, *post*, Book VI. Chap. 4. on Punishments.

for good behaviour for six months further; and on conviction for a second offence shall suffer two years imprisonment, and find sureties for two years more; and on conviction for a third offence shall be adjudged guilty of felony without benefit of clergy. The statute further provides by the third section "that if any person shall utter or tender "in payment any false or counterfeit money, knowing the "same to be false or counterfeit, to any person or persons; "and shall either the same day, or within the space of ten "days then next, utter or tender in payment any more or "other false or counterfeit money, knowing the same to be "false or counterfeit, to the same person or persons, or to "any other person or persons; or shall at the time of such "uttering or tendering have about him or her, in his or her "custody, one or more piece or pieces of counterfeit money "besides what was so uttered or tendered; then such per-"son so uttering or tendering the same shall be deemed "and taken to be *a common utterer* of false money; and "being thereof convicted shall suffer a year's imprisonment, "and find sureties for his or her good behaviour for two years "more, to be computed from the end of the said year; and "if any person having been once so convicted as a common "utterer of false money, shall afterwards again utter or "tender in payment any false or counterfeit money to any "person or persons knowing the same to be false or coun-"terfeit, then such person, being thereof convicted, shall "for such second offence be adjudged guilty of felony with-"out benefit of clergy." (*t*)

This statute like that of the 8 & 9 W. III. c. 26, mentioning counterfeit money, generally, is confined to the gold and silver coin of the realm. (*u*) In a case where the defendant was indicted for "unlawfully uttering and tender-

This statute does not include copper coin.

(*t*) By section 4 of this statute corruption of blood is saved, and by s. 8, any offender out of prison discovering two or more persons guilty of any of the said offences, so as they be thereof convicted, shall be pardoned.

(*u*) Ante, p. 76.

"ing in payment to I. H. ten counterfeit halfpence, know-"ing them to be counterfeit;" and this was laid in one count against the form of the statute, and in another generally; and the defendant was convicted on the general count, it being admitted at the trial that there was no statute applicable to the fact; upon reference to all the judges they held the conviction wrong, it not being an indictable offence. (*w*)

The statute will apply to the case of passing counterfeit money by the trick of ringing the changes.

The words of the statute "utter *or* tender in payment" are in the disjunctive, and will therefore apply to an uttering of counterfeit money, though it be not tendered in payment, but passed by the common trick called *ringing the changes*, as in the following case. The prosecutor having bargained with the prisoner, a Jew, who was selling fruit about the streets, to have five apricots for six-pence, gave him a good shilling to change. The prisoner put the shilling into his mouth, as if to bite it in order to try its goodness; and returning a shilling to the prosecutor, told him it was a bad one. The prosecutor gave him another good shilling which he also affected to bite; and then returned another shilling, saying it was not a good one. The prosecutor gave him another good shilling, with which he practised this trick a third time; the shillings returned by him being in every instance bad. The court held that the words of the statute were sufficient to include this case; and that *uttering* and *tendering in payment* were two distinct and independant acts. (*x*)

Where the indictment charges two utterings on the same day, each in a different count,

Some points have arisen as to the form of the indictment upon this statute of 15 Geo. II. c. 28. In one case the indictment charged the prisoner in the first count with having on the 15th December, 39 Geo. III. uttered to one G. S. a counterfeit half-crown, knowing it to be so, and in the *se-*

(*w*) Cirwan's case, *Oxford* Sum. Ass. 1794, MS. Jud. 1 East. P. C. c. 4. s. 28, p. 182. 2 Leach 831, note (a).

(*x*) Franks's case, 2 Leach 64.

cond count with having on the said 15th December, &c. uttered another counterfeit half-crown to the same person: and the prisoner was convicted on both counts. The question was raised whether, the uttering the counterfeit money twice on the same day *being stated in two counts*, the court could pronounce the greater punishment inflicted by the third section of the statute, or must give only the smaller punishment inflicted by the second section; and, upon reference to the judges, they held that this indictment was not sufficient to subject the prisoner to the larger penalty, as for uttering two pieces of counterfeit coin on the same day, there being no distinct averment of that fact. (*y*) But where two utterings are charged in one count of the indictment, on a certain day therein named, the day will be held to be material, and the fact of an uttering twice on the same day to be sufficiently averred. As where the indictment charged that the prisoner *on the 14th of February*, &c. uttered base coin to W. C.; and that *on the said 14th February*, &c. he uttered to J. L. other base coin, it was held sufficient to warrant the higher punishment of the third section of the statute; the utterings on the face of the indictment appearing to be on the same day. And the judges held at a conference upon this case, that though, when the day is not material, the fact may be proved on a day different from the day laid, yet where the day is not indifferent, the precise time laid must be proved: and that in this case it must be taken that it was proved that the defendant uttered counterfeit coin at two different times of the same day. (*z*)

the court cannot pronounce the greater punishment of the third section of the statute.

But where two utterings on a certain day named are charged in one count, the fact will be sufficiently averred.

(*y*) Tandy's case, 2 Leach 833. 1 East. P. C. c. 4. s. 29. p. 182, 183. Eyre, C. J. Buller, J. and Heath, J. were absent when this opinion was given, viz. Hil. T. 1799. The judges also thought it advisable to give judgment of imprisonment for six months singly, and not on each of the counts. And see Smith's case, 2 Leach 856.

(*z*) Martin's case, *Derby* Lent Ass. 1801, *cor.* Graham B. decided upon by the Judges in June in the same year. 2 Leach 923. 1 East. P. C. *Addend.* xviii.

The indictment need not state that the offender was a common utterer of false money to warrant the greater punishment of the third section of the statute.

When the former of these cases was considered by the judges, it appears that some doubt was entertained whether a count in an indictment, charging two utterings on the same day, should not, in order to bring an offender within the third section, conclude with an averment that the offender was *a common utterer of false money*, as that clause declares him to be. But this point was disposed of in a case, which occurred shortly afterwards, where the prisoner was indicted for uttering false money knowingly, and having about him at the time of such uttering other false money; without any averment that he was *a common utterer of false money*. Upon conviction judgment was respited to take the opinion of the judges upon the question, whether, in order to bring the case within the third section, the indictment should not have concluded with a distinct averment that the defendant was a common utterer of false money, or whether that were not the necessary conclusion of law from the facts stated. And the judges, upon search of precedents for many years back, finding that judgment had been given for the greater punishment upon indictments drawn in this form, although some were to be found containing the averment in question, held that such averment, though it would not hurt, was not necessary in order to warrant the greater punishment. (*a*)

In an indictment for a second offence against the 15 G. II. c. 28 s. 3. it is not necessary to state that the Court on the former trial, did adjudge the defendant to be a common utterer.

Consistently with this determination it was held in a subsequent case not to be necessary in an indictment for a second offence against this statute, to state that the court before which the former trial was had, did *adjudge* the defendant *to be a common utterer*. The indictment charged that the defendant was before that time *in due form of law tried and convicted* at the Guildford Quarter Sessions, on a certain indictment against him for uttering false and coun-

(*a*) Smith's case, *Maidstone* Sum. Ass. 1799, *cor.* Buller, J. decided upon by the Judges, Hil. T. 1800. 2 Leach 858. 2 Bos. and Pul. 127. 1 East. P. C. c. 4. s. 29. p. 183. The same judgment was given on another case of Benjamin Levi, reserved at the same time.

terfeit coin, knowing it to be such; having about him at the time, in his custody and possession, other false and counterfeit money; and that it was thereupon adjudged by the Court that he should be imprisoned for a year, and until he found sureties for his good behaviour for two years more; and then averred, that *having been so convicted as a common utterer of false money*, he afterwards uttered other false and counterfeit money. The objection taken in arrest of judgment, and which was reserved for the opinion of the judges, was this, that in stating the original record and judgment of the Court of Quarter Sessions, it is not stated that the Court did *adjudge* the defendant *to be a common utterer*, but only that they considered and adjudged the prisoner to be imprisoned twelve months, and to find surety for his good behaviour for two years more. But the judges held that it was not necessary that the Court should adjudge the defendant to be a common utterer, though the statute says he shall be *deemed and taken to be a common utterer*; that being a conclusion of law: and it being sufficient for the Court before which a defendant is convicted of an offence within the statute, to adjudge him to suffer the punishment inflicted by law on the offence. (*b*)

fendant to be a common utterer.

By the fifth section of the 15 Geo. II. c. 28, it is provided that offenders shall be indicted, arraigned, tried, and convicted, by such like *evidence*, and in such manner as counterfeitors of the coin; with a proviso that the prosecution be commenced within six months next after the offence committed.

Trial and evidence.

For the purpose of proving the act charged in the indictment to be done *knowingly*, it is the practice to receive proof of more than one uttering committed by the party about the same time, though only one uttering be charged in the indictment. This is in conformity with the practice

Evidence of guilty knowledge.

(*b*) Michael's case, Old Bailey, Feb. 1802. 2 Leach 938. 1 East. P. C. *Addend.* xix.

upon indictments for disposing of and putting away forged bank notes, knowing them to be forged; (*c*) upon one of which the counsel for the prisoners, objecting to such evidence, contended that it would not be allowed upon an indictment for uttering bad money; and stated that the proof in such case was always exclusively confined to the particular uttering charged in the indictment. But Mr. Baron Thomson said, that he by no means agreed in the conclusion of the prisoner's counsel, that the prosecutor could not give evidence of another uttering on the same day to prove *the guilty knowledge*. "Such other uttering (he observes) "cannot be punished until it has become the "subject of a distinct and separate charge; but it affords "strong evidence of the knowledge of the prisoner that the "money he uttered was bad. If a man utter a bad shilling, "and fifty other bad shillings are found upon him, this "would bring him within the description of a common "utterer; but if the indictment do not contain that charge, "yet these circumstances may be given in evidence on any "other charge of uttering, to shew that he uttered the "money, with a knowledge of its being bad." (*d*)

(*c*) Whiley and Haines (case of) 2 Leach 983. 1 New. R. 92. Tattershall's case cited in Whiley and Haines. And see Ball's case, 1 Campb. 325, where upon an indictment at *Lewes* Sum. Assizes 1807, against the prisoner for knowingly uttering a forged bank note, the note in question was proved to have been uttered by the prisoner on the 17th of June; and evidence was then given of his having uttered another forged note of the same manufacture on the 20th March preceding; and that there had been paid into the Bank of England various forged notes dated between Dec. 1806 and March 1807, all of the same manufacture, and having different indorsements upon them in the hand-writing of the prisoner: but it did not appear at what times the Bank of England had received these notes. The indorsements, however, in the hand-writing of the prisoner were considered as evidence of such notes having been in his possession. Upon reference to the judges, they were all of opinion that the evidence as given in this case was properly admitted. And see Phill. on Evid. 137.

(*d*) Whiley and Haines (case of) 2 Leach 983.

By the ninth section of the 15 Geo. II. c. 28, it is enacted that "if any person be convicted of uttering or tendering "any false or counterfeit money as aforesaid, and shall af- "terwards be guilty of the like offence in any other county "or city, the clerk of the assize, or clerk of the peace of "the county or city, where such conviction was had, shall, "at the request of the prosecutor, or any other, on his Ma- "jesty's behalf, certify the same by a transcript in a few "words, containing the effect and tenor of such conviction, "for which certificate two shillings and sixpence, and no "more, shall be paid; and such certificate, being produced "in Court, shall be sufficient proof of such former con- "viction." (*e*)

In prosecutions for a second offence, a transcript of the former conviction shall be evidence.

SECT. II.

OF UTTERING, TENDERING, &c. FOREIGN COUNTERFEIT COIN.

THIS offence, particularly with respect to the gold coin called Louis d'or, and silver dollars, is stated in the statute 37 Geo. III. c. 126. to have greatly increased; and the third section of that statute makes the following provision against it. "That if any person or persons shall, from "and after the passing of this act, *utter, or tender in pay-* "*ment, or give in exchange, or pay or put off,* to any person "or persons, any such false or counterfeit coin as aforesaid "(namely, by the second section, coin not the proper coin "of this realm, nor permitted to be current within the "same,) resembling, or made with intent to resemble or

37 Geo. III. c. 126. Six months imprisonment, and sureties for six months.

(*e*) By this it seems that the justices of the peace in sessions have power to try such offenders; otherwise this direction to the clerk of the peace to certify the conviction is incongruous; for he is not the proper person to certify what is done in another court, where he is not necessarily supposed to be present: but no power is given to the sessions by any express words in this statute to hear and determine such offences.

" look like any gold or silver coin of any foreign prince,
" state, or country, or to pass as such foreign coin, knowing
" the same to be false or counterfeit, and shall be thereof
" convicted, every person so offending shall suffer six
" months imprisonment, and find sureties for his or her
" good behaviour for six months more, to be computed from
For a second offence two years imprisonment, and sureties for two years. " the end of the said first six months; and if the same per-
" son shall afterwards be convicted a second time for the
" like offence of uttering or tendering in payment, or giving
" in exchange, or paying or putting off any such false or
" counterfeit coin as aforesaid, knowing the same to be
" false or counterfeit, such person shall for such *second*
" *offence* suffer two years imprisonment, and find sureties
" for his or her good behaviour for two years more, to be
For a third offence felony, without benefit of clergy. " computed from the end of the said first two years; and if
" the same person shall afterwards offend a third time, in
" uttering, or tendering in payment, or giving in exchange,
" or paying or putting off, any such false or counterfeit
" coin as aforesaid, knowing the same to be false or coun-
" terfeit, and shall be convicted of such third offence, he or
" she shall be adjudged to be guilty of felony without benefit
" of clergy."

Evidence of former conviction by means of a certificate.

A *certificate* of a former conviction is made sufficient evidence upon the trial of an offender for a further offence. The fifth section of the statute enacts, that if any person shall be convicted of uttering or tendering any such false or counterfeit coin as aforesaid, and shall afterwards be guilty of the like offence in any other county, city, or place, the clerk of the assize, or clerk of the peace for the county, city, or place, where such former conviction shall have been had, shall, at the request of the prosecutor, or any other on his Majesty's behalf, certify the same by a transcript, in few words, containing the effect and tenor of such conviction; for which certificate two shillings and sixpence, and no more, shall be paid; and such certificate being produced in court shall be sufficient proof of such former conviction.

Having in custody a greater number than five pieces of counterfeit foreign coin, whether current here or not, makes the party liable to punishment by proceedings before a justice of the peace. The sixth section of the statute enacts, that "if any person or persons shall have in their custody, "without lawful excuse, any greater number than five "pieces of false or counterfeit coin, of any kind or kinds, "resembling, or made with intent to resemble or look like, "any gold or silver coin or coins of any foreign prince, "state, or country, or to pass as such foreign coin; every "such person, being thereof convicted upon oath before one "justice of the peace, shall forfeit all such false and coun- "terfeit coin, which shall be cut in pieces by order of such "justice; and shall for every such offence forfeit a sum not "exceeding five pounds, nor less than forty shillings, for "every such piece of false or counterfeit coin which shall "be found in the custody of such person; one moiety to "the informer, the other to the poor of the parish where "the offence was committed; and in default of payment "forthwith shall be committed to the common gaol or house "of correction, there to be kept to hard labour for three "calendar months, or until such penalty be paid."

Persons having in custody above a certain number of pieces of counterfeit foreign coin, may be proceeded against before a magistrate.

CHAPTER THE FIFTH.

Of receiving or paying for the current Coin any more or less than its lawful value.

5 and 6 Edw. VI. c. 19.

THE statute 5 and 6 Edw. VI. c. 19, reciting that divers covetous persons of their own authorities, and notwithstanding a statute of 25 Edw. III. st. 2. c. 12. had of late taken upon them to make exchanges, as well of coined gold as of coined silver, receiving and paying therefore more than the current value as it had been declared by the king's proclamation; enacted, that if any person should exchange any coined gold, silver, or money, giving, receiving, or paying any more in value, benefit, profit, or advantage for it than the same was or should be declared by the king's proclamation to be current for, within this realm and the king's other dominions, that then all the said coined gold, silver, and money so exchanged should be forfeited, and the offenders be imprisoned for a year, and fined at the king's pleasure.

Exchanging guineas for bank notes not within this statute.

It was objected in two recent cases, that *the exchanging guineas for bank notes*, taking the guineas in such exchange at a higher value than they were current for by the king's proclamation, was not an offence within this statute: and, after solemn arguments at several times before the judges, the point was decided in favour of the objection. (*a*) In consequence of this decision several statutes were passed upon the subject which it will be proper to notice.

51 Geo. III. c. 127. and

The 51st Geo. III. c. 127. s. 1. enacted that no person should receive or pay for any current gold coin any more in

(*a*) The King against De Yonge, 14 East. 402. and the King against Wright, cited 14 East. 404.

value, benefit, profit, or advantage, than the lawful value of such coin, whether such value, benefit, profit or advantage, should be paid, made, or taken in lawful money, or in bank notes or bank tokens, or by any other means: and it further enacted, (*b*) that no person should receive or pay any notes or bills of the bank of England for less than the amount expressed therein, except discount, on notes or bills not expressed to be payable on demand; and made the offence in each of these cases a misdemeanor. This act was to be in force only to the 25th March 1812; but the 52d Geo. III. c. 50. reciting that it was expedient that it should be continued and amended, and extended to Ireland, enacts, that no person shall receive or pay for any current gold coin any *more* in value, benefit, profit, or advantage than the true value according to its denomination, whether such value, benefit, profit, or advantage be paid, made, or taken in lawful money, or if paid or taken in Great Britain, in any bank of England notes, bills, or tokens, or if paid or taken in Ireland, in any bank of Ireland notes, bills, or tokens, or by any or all such means, or by any other means, device, shift, or contrivance whatsoever. And that offenders shall be guilty of a misdemeanor, and suffer six months imprisonment, and find sureties for one year more; and for a *second offence* shall suffer a year's imprisonment, and find sureties for one year more; and for every subsequent offence shall be imprisoned for two years. This statute also enacts, (*c*) that no person shall receive or pay in Great Britain any bank of England notes or bills, or in Ireland any bank of Ireland notes or bills, for less than the amount expressed therein, except discount on such notes or bills as shall not be expressed to be payable on demand: and makes the offender guilty of a misdemeanor, and subject to a fine of double the amount of the sum of money specified in such bill or note, and made payable thereby, and to imprisonment for two months. The eleventh section of the act provided that it should only be in force until three months after the commencement of the next

52 Geo. III. c. 50. as to receiving or paying for gold coin more than its lawful value, whether in money or bank notes.

Second and subsequent offences.

And also as to receiving or paying bank notes for less than the amount expressed therein.

(*b*) S. 2. (*c*) S. 5.

session of parliament; but it was continued by the 53d Geo. III. c. 5. to the 25th March 1814, and further continued by the 54th Geo. III. c. 52. during the continuance of any act imposing any restriction on the bank of England with respect to payments in cash. (*d*)

56 Geo. III. c. 68. s. 13. as to receiving or paying for gold coin more or less than its value, according to its denomination.

A further provision is made upon this subject by the 56th Geo. III. c. 68. s. 13. as to receiving the current gold coin for *more or less* than its value according to its denomination. The statute enacts, that "no person shall by any means, "device, shift, or contrivance whatsoever, receive or pay "for any gold coin lawfully current within the united king- "dom of Great Britain and Ireland any *more or less* in "value, benefit, profit, or advantage than the true lawful "value which such gold coin doth or shall by its denomina- "tion import; nor shall utter or receive any piece or "pieces of gold coin of this realm at any greater or higher "rate or value, nor at any less or lower rate or value than "the same shall be current for in payment according to the "rates and values declared and set upon them pursuant to "law." And the statute further enacts, that every person offending shall be guilty of a misdemeanor, shall suffer imprisonment for six calendar months, and shall find sureties for one year more; and that for a *second offence* the offender shall suffer a year's imprisonment, and find sureties for one year more; and for every *subsequent offence* shall be imprisoned for the term of two years. Both the 52d Geo. III. c. 50. and the 56th Geo. III. c. 68. contain a clause by which it is enacted, that if any person shall be convicted of receiving or paying any gold coin contrary to the act, and shall afterwards be guilty of the like offence, the clerk of assize, or clerk of the peace for the county, city, or place where such conviction was so had, shall, at the request of the prosecutor, or any other person

Second offence.

Subsequent offence.

Evidence of former conviction by a certificate.

(*d*) The 44th Geo. III. c. 1. imposing restrictions on payments of cash by the bank of England, and continued by other acts, is further continued by 56 Geo. III. c. 40. to the 5th July 1818.

on his Majesty's behalf, certify such conviction; for which certificate two shillings and sixpence, and no more, shall be paid; and that such certificate being produced in Court shall be sufficient proof of the former conviction.

Not necessary to prove the money, &c. received or paid for any gold coin, to be good money, &c.

The 52 Geo. III. c. 50. also provides, that on any prosecution or trial of any offender for any offence against that act, or the 51 Geo. III. c. 127. it shall not be necessary to prove, that the money, notes, bills, tokens, securities, warrants, or orders for payment of money, received or paid for any gold coin, are respectively good current money, or good, valid, and effectual notes, bills, &c. or that they are respectively of the value they on the face of them import; but that they shall be deemed and taken to be good, valid, and effectual respectively, and of the respective values which on the face of them they import, until the contrary shall be proved to the satisfaction of the judge, justice, or court, before whom the offender shall be prosecuted or tried: and that it shall not be necessary to prove that the gold coin received or purchased is the current gold coin of this realm, but that the same shall be deemed and taken so to be, if paid or received as such, until the contrary thereof shall be proved to the satisfaction of the judge, justice, or court, before whom the offender shall be prosecuted or tried. The 56 Geo. III. c. 68. s. 16. also enacts, that on any prosecution or trial for any offence against that act, it shall not be necessary to prove that the gold coin received or paid, or uttered contrary to that act, is the current gold coin of the realm, but that the same shall be deemed and taken so to be, if received or paid, or uttered as such, until the contrary thereof shall be proved to the satisfaction of the judge, justice, or court, before whom such offender shall be prosecuted or tried.

Nor the gold coin received or purchased to be current gold coin.

Indictments not to be traversed.

The 56 Geo. III. c. 68. s. 15. enacts, that no person against whom any bill of indictment shall be found at any assizes or sessions of the peace, for any offence against that act, shall be entitled to traverse the same to any sub-

sequent assizes or sessions; but that the court, at which such bill of indictment shall be found, shall forthwith proceed to try the person or persons against whom the same shall be found, unless he, she, or they shall shew good cause, to be allowed by the court, why his, her, or their trial should be postponed. The 52 Geo. III. c. 50. s. 3. contains a similar provision as to indictments for offences against that act, or against the statute 51 Geo. III. c. 127.

CHAPTER THE SIXTH.

Of serving, or procuring others to serve, Foreign States.

ENTERING into the service of any foreign state without the consent of the king, or contracting with it any other engagement which subjects the party to an influence or controul inconsistent with the allegiance due to our own sovereign, is, at common law, a high misdemeanor, and punishable accordingly. (*a*) Indeed it is considered as so high an offence to prefer the interest of a foreign state to that of our own, that any act is criminal which may but incline a man to do so; as to receive a pension from a foreign prince without the leave of the king. (*b*)

Serving foreign states, a misdemeanor at common law.

But with respect to serving, or procuring others to serve, foreign states, provisions have been made by several statutes. The 3 Jac. I. c. 4. s. 18. enacts, that "every subject of this realm that shall go or pass out of this realm to serve any foreign prince, state, or potentate, or shall pass over the seas, and shall voluntarily serve any such foreign prince, state, or potentate, not having before his going taken the oath of obedience, (*c*) shall be a felon." The nineteenth section of the statute enacts, that "if any gentleman or person of higher degree, or any person which hath borne, or shall bear any office, or place of captain, lieutenant, or any other place, charge, or office, in camp, army, or company of soldiers, or conductor of soldiers,

3 Jac. I. c. 4. s. 18. as to subjects going out of the realm to serve, &c. felony.

(*a*) 1 East. P. C. c. 2. s. 23. p. 81. 4 Blac. Com. 122.

(*b*) 1 Hawk. P. C. c. 22. s. 3. 4 Bl. Com. 121. 3 Inst. 144.

(*c*) The oath is set forth in the act, but it has been since taken away by 1 W. and M. sess. 1. c. 8. s. 2. and new oaths of allegiance and supremacy enjoined in its room.

" shall after go or pass voluntarily out of this realm to serve " any such foreign prince, state, or potentate, or shall vo- " luntarily serve any such prince, state, or potentate, before " that he and they shall become bound by obligation, with " two sureties, &c." with a condition, to the effect that he will not be reconciled to the see of Rome, nor enter into any conspiracy against the king (as particularly set forth in the act) " he shall be a felon."

Construction.

Upon the construction of this statute it has been considered, that if a party go out of the realm with intent to serve a foreign state, although there be no service in fact; or if a party do actually so serve, though he did not go over for that purpose, but upon some other occasion, it will be within the statute. (*d*)

Trial.

The trial of an offence against this statute is to be where the offence is committed, which is at the place where the party passed out of the kingdom. (*e*).

9 Geo. II. 30. enlisting, or procuring others to enlist, &c. into foreign service, felony without clergy.

The statute 9 Geo. II. c. 30. intituled, " An act to pre- " vent the listing his Majesty's subjects to serve as soldiers " without his Majesty's licence," enacts, that " if any subject " of Great Britain shall *enlist or enter himself*, or if any per- " son shall *procure* any subject to enlist or enter himself, or " hire or retain any subject with intent to cause him to enlist " or enter himself, or procure any subject to go beyond seas, " or embark with intent and in order to be enlisted to serve " any foreign prince, state, or potentate, *as a soldier*, with- " out his Majesty's licence under his sign manual; every " such offender shall, on conviction, be guilty of felony with- " out benefit of clergy." Doubts arose upon this act, whether the procuring persons to go beyond the seas or embark, with the intent of being enlisted into foreign service when abroad, without actually giving them any enlisting

(*d*) 3 Inst. 80. 1 East. P. C. c. 2. s. 23. p. 82.

(*e*) 3 Inst. 80. 3 Jac. I. c. 4. s. 36.

money at the time of their being hired or procured, was within its meaning and intention: whereupon it was enacted by the 29 Geo. II. c. 17. s. 4. "that if any subject hath "engaged, contracted, or agreed, or shall engage, &c. "within Great Britain or Ireland to go beyond seas, or em- "bark with an intent and in order to enlist and enter him- "self to serve as a soldier in any foreign service, *though no* "*enlisting money be actually paid to or received by him;* or "if any person hath hired, retained, engaged, or procured, "or shall hire, &c. any subject of his Majesty, his heirs "or successors, though no enlisting money hath been or "shall be actually paid to or received by him, to agree to "go beyond the seas, or embark with an intent and in order "to be enlisted to serve any foreign prince, &c. as a soldier, "without leave or licence of his Majesty, his heirs or suc- "cessors, had and obtained for that purpose, every such "offender shall be adjudged guilty of felony, without benefit "of clergy."

Though no enlisting money be paid or received, 29 Geo. II. c. 17. s. 4.

The 29 Geo. II. c. 17. also enacts, (*f*) "that if any sub- "ject of Great Britain shall take or accept of any military "commission, or otherwise enter into the military service of "the *French* king as a commissioned or non-commissioned "officer, without leave or licence of his Majesty, his heirs "or successors, first had or obtained for that purpose, "under the sign manual of his Majesty, his heirs or suc- "cessors; every such person so offending shall be adjudged "guilty of felony and suffer death, as in cases of felony "without benefit of clergy." (g)

29 Geo. II. c. 17. s. 1. entering the French king's service without leave, &c. felony without clergy.

The third section of the 9 Geo. II. c. 30. with respect to cases within that act, provides, that if the person so enlisted or enticed to go beyond seas, in order to be enlisted as a non-commissioned officer or private soldier, shall, upon oath to a magistrate, discover the person by whom he was so

By 9 Geo. II. c. 30. s. 3. persons discovering those who entice them to go to be enlisted, are indemnified.

(*f*) Sec. 1.

(g) Attainder is not to work corruption of blood, loss of dower, or disherison of heirs, s. 7.

enlisted or enticed, within fourteen days after such enlisting or agreement to go beyond seas, so that he may be apprehended and convicted, such person, so discovering, shall be indemnified.

Trial may be in any county in England.

Offences committed against the statute 9 Geo. II. c. 30. and 29 Geo. II. c. 17. out of the realm, may be alleged to be committed, and may be laid, inquired of, and tried, in any county in England. (*h*)

Disobedience to the king's commands to return, or to stay at home, or to refuse to assist the king in council or war.

It may be observed, though not strictly applicable to the subject of this chapter, that disobedience to the king's letter to a subject commanding him to return from beyond the seas, or to the king's writ of *ne exeat regno*, commanding a subject to stay at home, is a high misprision and contempt. (*i*) And it is also a high offence to refuse to assist the king for the good of the public, either in councils, by advice, if called upon, or in his wars by personal service for defence of the realm against a rebellion or invasion: (*k*) under which class may be ranked the neglecting to join the *posse comitatus*, or power of the county, being thereunto required by the sheriff or justices, according to the statute 2 Hen. V. c. 8. which is a duty incumbent upon all that are fifteen years of age under the degree of nobility, and able to travel. (*l*)

(*h*) 9 Geo. II. c. 30. s. 2. 29 Geo. II. c. 17. s. 6.

(*i*) 4 Blac. Com. 122. And if the subject neglects to return from beyond the seas, when commanded, his lands shall be seised till he does return. 1 Hawk. P. C. c. 22. s. 4.

(*k*) 1 Hawk. P. C. c. 22. s. 2.

(*l*) 4 Blac. Com. 122. Lamb. Eir. 315.

CHAPTER THE SEVENTH.

Of seducing Soldiers to desert or mutiny.

37 Geo. III. c. 70. seducing soldiers or sailors felony without benefit of clergy.

IN consequence of the attempts of evil disposed persons by the publication of written or printed papers, and by malicious and advised speaking, to seduce soldiers and sailors from their duty and allegiance to his Majesty, the 37 Geo. III. c. 70. was passed, enacting "that any person "who shall maliciously and advisedly endeavour to seduce "any person or persons serving in his Majesty's forces by "sea or land, from his or their duty and allegiance to his "Majesty, or to incite or stir up any such person or "persons to commit any act of mutiny, or to make, or "endeavour to make, any mutinous assembly, or to com- "mit any traitorous or mutinous practice whatsoever, "shall, on being legally convicted of such offence, be ad- "judged guilty of felony, and shall suffer death as in cases "of felony without benefit of clergy." The third section of the act provides, that any person tried, acquitted, or convicted, of any offence against this act shall not be liable to be prosecuted again for the same offence or fact, as high treason, or misprision of high treason; and that nothing in the act contained shall prevent the trial of any person who has not been tried for an offence against this act, from being tried for the same as high treason, or misprision of high treason. And it is provided by the second section, that any offence against this act, whether committed on the high seas or in England, may be prosecuted and tried before any court of oyer and terminer, or gaol delivery, for any county in England, as if the said offence had been therein committed.

Trial.

Indictment.

It has been decided, that an indictment upon this statute need not set out *the means* used for seducing the soldier from his duty and allegiance; and that it need not aver that the prisoner *knew* the person endeavoured to be seduced *to be a soldier*. It seems also that a double act, namely, that the prisoner endeavoured to incite a soldier to commit mutiny, and also to commit traitorous and mutinous practices, may be charged in one count of the indictment. (*a*)

This act of the 37 Geo. III. c. 70. was only temporary; but after having been continued from time to time by different statutes, was recently made perpetual (together with an act upon the same subject, passed at the same time in the parliament of Ireland,) by the 57 Geo. III. c. 7.

By the statute 1 Geo. I. c. 47. persons persuading or procuring soldiers to desert are subjected to a penalty, and under certain circumstances to imprisonment: and the late mutiny act, 57 Geo. III. c. 12., contains a clause of a description nearly similar, but increasing the penalty and the punishment.

1 Geo. I. c. 47. persons persuading, &c. soldiers to desert, liable to penalty and imprisonment.

The statute 1 Geo. I. c. 47. enacts, that if any person (other than enlisted soldiers, against whom it is stated sufficient remedy was already provided by law,) shall, in Great Britain, Ireland, Jersey, or Guernsey, persuade or procure any soldier to desert, he shall forfeit 40*l.* to be recovered by any informer; and if he has not property to that amount, or from the heinous circumstances of the crime it shall be thought proper, the court before whom he is convicted shall imprison him, not exceeding six months. Section 149 of the 57 Geo. III. c. 12. provides, that if any person shall, in any part of his majesty's dominions, directly or indirectly persuade or procure any soldier or soldiers in the service of his Majesty, his heirs or successors, to desert or leave such

57 Geo. III. c. 12. s. 149.

(*a*) Fuller's case, 2 Leach 790. Bos. and Pul. 180. 1 East. P. C. c. 2. s. 33. p. 92.

service, every such person so offending and being lawfully convicted, shall, for every such offence, forfeit to his Majesty, his heirs or successors, or to any other person or persons who shall sue for the same, 100*l.*; and if he has not goods, chattels, lands, or tenements, to that value, or if from the circumstances and heinousness of the crime it shall appear to the court, before which the conviction shall be made, that such forfeiture is not a sufficient punishment, such court may commit the offender to prison for any time not exceeding twelve months. The punishment of the pillory is also added to the imprisonment by the same section; but a prior act, 56 Geo. III. c. 138. enacts, that from the passing of that act judgment shall not be given and awarded against any person convicted of any offence, that such person do stand in or upon the pillory, except for the offences of perjury and subornation of perjury, any law, statute, or usage, to the contrary notwithstanding. The statute 1 Geo. I. c. 47. also added the punishment of the pillory; and upon an information filed in the Court of King's Bench upon that statute, prior to the 56 Geo. III. c. 138. and tried at the assizes, it was held that it was necessary, if the court awarded imprisonment in addition to the 40*l.* penalty, to award the pillory also. (*b*) It was also decided in the same case, that the court of King's Bench was the proper court to award the punishment upon such information, and that it ought not to be awarded at the assizes where the trial and conviction took place. (*c*)

Consequences of desertion to the party deserting.

With respect to the consequences to the party deserting, it may be observed, that desertion in time of war was made a capital crime by 18 Hen. VI. c. 19. enforced by 2 and 3 Edw. VI. c. 2. s. 6. repealed as to the felony by 1 M. sess. 1. c. 1. revived by 4 and 5 Ph. and M. c. 3. s. 9. and extended to mariners and gunners by 5 Eliz. c. 5. s. 27. But these statutes are now fallen into disuse, as well on account of the manner of retaining soldiers therein referred to being

(*b*) The King against Read, 16 East. 404.

(*c*) *Id. Ibid.*

no longer adopted, as because, since the annual acts for punishing mutiny and desertion, a more compendious and convenient system of military coercion has obtained. (*d*) The mutiny act, 57 Geo. III. c. 12. reciting, that no man can be forejudged of life or limb, or subjected, *in time of peace*, to any kind of punishment within this realm by martial law, or in any other manner than by the judgment of his peers, and according to the known and established laws of the realm; yet that nevertheless it being requisite for retaining the forces in their duty, that an exact discipline be observed, and that soldiers who shall mutiny, or stir up sedition, or desert, be brought to more exemplary and speedy punishment than the usual forms of law will allow, enacts, that if any officer or soldier shall, during the continuance of the act, commit any of the offences therein enumerated, amongst which is *desertion*, the offender shall suffer death, or such other punishment as shall be awarded by a court martial.

(*d*) 1 East. P. C. c. 2. s. 34. p. 93.

CHAPTER THE EIGHTH.

Of Piracy.

IN treating shortly of this offence, we may consider, I. Of Piracy at common law, and by statutes. II. Of the places in which the offence may be committed. III. Of the court by which it may be tried.

SECT. I.

OF PIRACY AT COMMON LAW, AND BY STATUTES.

Piracy at common law.

THE offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas, which if committed upon land would have amounted to felony there. (*a*) But it is no felony at common law, and it was only punishable by the civil law before the statute 28 Hen. VIII. c. 15.; and this statute, though it makes the offence capital, and provides for the trial of it according to the course of the common law, by the king's special commission, does not make it a felony; therefore a pardon of all felonies generally does not extend to it. (*b*)

Piracy by statutes. 11 and 12 W. III. c. 7. s. 8. as to acts done under the commis-

The offence of piracy is also provided against by the enactments of several statutes. The 11 and 12 W. III. c. 7. s. 8. enacts, that "if any of his Majesty's natural born "subjects, or denizens of this kingdom, shall commit any "piracy or robbery, or any act of hostility against others

(*a*) 1 Hawk. P. C. c. 37. s. 4. 4 Blac. Com. 72. 2 East. P. C. c. 17. s. 3. p. 796.

(*b*) 1 Hawk. P. C. c. 37. s. 13. 3 Inst. 112. 2 East. P. C. c. 17. s. 3. p. 796. where it is said that the offence does not extend to corruption of blood, at least where the conviction is before the Admiralty jurisdiction; though the contrary is holden by considerable authority upon attainder before commissioners, under the statute of Hen. VIII.

sion of a foreign state. And 18 Geo. II. c. 30. as to piracy committed under an enemy's commission.

" his Majesty's subjects upon the sea, under colour of any " commission from any foreign prince or state, or pretence " of authority from any person whatsoever, such offender and " offenders shall be deemed, adjudged, and taken to be pirates, " felons, and robbers;" and being duly convicted thereof, according to that act, or the statute 28 Hen. VIII. c. 15. shall suffer such pains of death, and loss of lands, goods, and chattels, as pirates, &c. upon the seas ought to suffer. And the 18 Geo. II. c. 30. enacts, " that all persons being natural " born subjects or denizens of his Majesty, who during any " war shall commit any hostilities upon the sea, or in any " haven, river, creek, or place, where the admiral or admirals " have power, authority, or jurisdiction, against his Majesty's " subjects, by virtue or under colour of any commission from " any of his Majesty's enemies, or shall be any other ways " adherent, or giving aid or comfort to his Majesty's enemies " upon the sea, or in any haven, river, creek, or place, where " the admiral or admirals have power, authority, or jurisdic- " tion, may be tried as pirates, felons, and robbers in the said " court of Admiralty, on ship-board, or upon the land, in the " same manner as persons guilty of piracy, felony, and rob- " bery, are by the said act (*c*) directed to be tried; and such " persons being upon such trial convicted thereof, shall suffer " such pains of death, loss of lands, &c. as any other pirates, " felons, and robbers, ought by virtue of the statute 11 and " 12 W. III. c. 7. or any other act, to suffer." (*d*)

Commanders, seamen, &c. running away with ship or cargo, &c. or yielding vo-

The ninth section of the statute 11 and 12 W. III. c. 7. enacts, that " if any commander or master of any ship, or " any seaman or mariner, shall, in any place where the ad- " miral hath jurisdiction, betray his trust, and turn pirate,

(*c*) 11 and 12 W. III. c. 7.

(*d*) Section 2. contains a proviso that any person tried and acquitted, or convicted according to the act, shall not be liable to be indicted, &c. again in Great Britain or elsewhere, for the same crime or fact as high treason. But by sec. 3. the act is not to prevent any offender who shall not be tried according thereto, from being tried for high treason within this realm, according to the statute 28 Hen. VIII. c. 15.

" enemy, or rebel; and piratically and feloniously run away " with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods or merchandize; or yield them " up voluntarily to any pirate; or shall bring any seducing " message from any pirate, enemy, or rebel; or consult, " combine, or confederate with, or attempt or endeavour to " corrupt any commander, master, officer, or mariner, to yield " up or run away with any ship, goods or merchandizes, or " turn pirates, or go over to pirates; or if any person shall " lay violent hands on his commander, whereby to hinder " him from fighting in defence of his ship, and goods committed to his trust, (*e*) or shall confine his master, or " make or endeavour to make a revolt in the ship, he shall " be adjudged, deemed, and taken to be a pirate, felon, and " robber, and being convicted thereof according to the direction of this act, shall suffer death and loss of lands, " goods, and chattels, as pirates, felons, and robbers upon " the seas, ought to suffer."

luntarily to pirates, or confederating with them; attempting to corrupt the crew, &c. and persons putting force upon the commander.

By the statute 8 Geo. I. c. 24. s. 1. " in case any person " or persons belonging to any ship or vessel whatsoever, " upon meeting any merchant ship or vessel on the high " seas, or in any port, haven, or creek whatsoever, shall " forcibly board or enter into such ship or vessel; and " though they do not seize or carry off such ship or vessel, " shall throw overboard or destroy any part of the goods or " merchandizes belonging to such ship or vessel; the person or persons guilty thereof, shall in all respects be " deemed and punished as pirates as aforesaid."

Forcibly entering merchant ships and destroying goods. 8 Geo. I. c. 24. s. 1. made perpetual by 2 Geo. II. c. 28. s. 7.

The same statute of Geo. I. s. 1. enacts also, that " if any " commander or master of any ship or vessel, or any other

Trading with pirates, furnishing them

(*e*) This last provision is similar to one in the stat. 22 and 23 Car. II. c. 11. s. 9. which enacts generally, that such an offender shall suffer death as a felon; but does not specify any mode by which he is to be tried. This statute of Car. II. contains also some provisions as to yielding without fighting, and as to mariners' declining or refusing to fight and defend the ship when commanded by the master.

with ammunition, &c. combining or corresponding with them, &c. 8 Geo. I. c. 24. s. 1.

"person or persons, shall anywise trade with any pirate by "truck, barter, exchange, or in any other manner, or shall "furnish any pirate, felon, or robber upon the seas, with "any ammunition, provision, or stores of any kind; or shall "fit out any ship or vessel knowingly, and with a design to "trade with, or supply, or correspond with any pirate, felon, "or robber upon the seas; or if any person or persons shall "any ways consult, combine, confederate, or correspond "with any pirate, felon, or robber on the seas, knowing him "to be guilty of any such piracy, felony, or robbery, every "such offender and offenders shall be deemed and adjudged "guilty of piracy, felony, and robbery." The act further provides, that every offender convicted of any piracy, felony, or robbery, by virtue of the act shall not be admitted to have the benefit of clergy. (*f*)

Ransoming illegally neutral ships which have been made prize, 32 G. II. c. 25. s. 12.

The statute 32 Geo. II. c. 25. s. 12, provides that in case any commander of a private ship or vessel of war duly commissioned by the 29 Geo. II. c. 34, or that act, shall agree with any commander or other person belonging to any neutral or other ship or vessel (except those of his Majesty's declared enemies) for the ransom of any such neutral or other ship or vessel, or the cargo, after the same has been taken as a prize; and shall in pursuance of such agreement quit, set at liberty, or discharge, any such prize, instead of bringing it into some port of his Majesty's dominions; such offender shall be deemed and adjudged guilty of piracy, felony, and robbery, and shall suffer death. (*g*)

(*f*) S. 4. and by s. 2. every vessel fitted out to trade, &c. with pirates, and also the goods, shall be forfeited, half to the crown and half to the informer. Offenders against this act are to be tried according to the 28 Hen. VIII. c. 15. and 11 and 12 W. III. c. 7.

(*g*) Section 13. allows contraband goods to be taken from a neutral vessel, liable only to the forfeiture of such goods, and that thereupon the neutral vessel may be discharged. A question is made whether this act is still in force in 1 East. P. C. c. 17. s. 7. p. 801. The statute 22 Geo. III. c. 25, prohibits ransoming any ship belonging to any subject of his Majesty, or goods on board the same which

Cases of piracy.

Prior to these statutes (except the statute of Hen. VIII.) the following case was decided upon the subject of piracy. Several mariners on board a ship lying near the Groyne, seized the captain, he not agreeing with them, and having put him on shore, carried away the ship, and afterwards committed several piracies. This force upon the captain, and the carrying away the ship, which was explained by the use of it afterwards, was adjudged piracy; and they were executed. (*h*) But in a subsequent case where the master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, which he caused to be insured, and after he had run the goods on shore in England, the ship was burned, when he protested both the ship and cargo as burned, with intent to defraud the owner and insurers; the judges of the common law, who assisted the judge of the Admiralty, directed an acquittal upon an indictment for piracy and stealing the goods; because, being only a breach of trust and no felony, it could not be piracy to convert the goods in a fraudulent manner until the special trust was determined. (*i*)

Case on the 18 Geo. II. c. 30. adhering to the king's enemies triable as piracy.

Upon an indictment on the statute 18 Geo. II. c. 30, a question was made whether *adhering to the King's enemies* in hostilely cruising in their ships could be tried *as piracy* under the usual commission granted by virtue of the statute 28 Hen. VIII. c. 15. The statute 18 Geo. II. recites that doubts had arisen whether subjects entering into the service of the king's enemies, on board privateers and other ships, having commissions from France and Spain, and having by such adherence been guilty of high treason, could be deemed guilty of felony within the intent of the act of 11 & 12 W. III. c. 7, and be triable by the court of Ad-

shall be captured by the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects.

(*h*) Rex v. May, Bishop, and others, Nov. 1696, MS. Tracy 77. 2 East. P. C. c. 17. s. 3. p. 796.

(*i*) Mason's case, Old Bailey, 9 Geo. I. on a special commission, 8 Mod. 74. 2 East. P. C. c. 17. s. 3. p. 796. S. C.

miralty appointed by virtue of the said act; and then enacts that persons who shall commit hostilities upon the sea, &c. against his Majesty's subjects by virtue or under colour of any commission from any of his Majesty's enemies, or shall be *any otherwise adherent* to his Majesty's enemies upon the sea, &c. may be tried *as pirates*, felons, or robbers, in the said court of Admiralty in the same manner as persons guilty of piracy, felony, and robbery, are by the said act directed to be tried: but it does not say that they shall be *deemed pirates*, &c. as in the stat. 11 & 12 W. III. c. 7. The prisoner having been convicted, the question was reserved for the consideration of the judges; and it was agreed by eight who were present, (*k*) that the prisoner had been well tried under the commission. For that taking the two statutes of 11 & 12 W. III. and 18 Geo. II. together, and the doubt raised in the latter, and also its enactment that in the instances therein mentioned, and also in case of any other adhering to the king's enemies, the parties might be tried as pirates by the court of Admiralty according to that statute, it was substantially declaring that they should be *deemed pirates;* and that it was a just construction in their favour to allow them to be tried *as such* by a jury. (*l*)

Of accessories 11 & 12 W. III. c. 7.

Accessories to piracy were triable only by the civil law if their offence was committed on the sea, and were not triable at all if their offence was committed on land, until the statute 11 & 12 W. III. c. 7. The tenth section of that statute enacts, "that every person and persons whatsoever, who shall either on the land, or upon the seas, "knowingly or wittingly set forth any pirate; or aid and

(*k*) Lord Loughborough, Lord C. B. Skynner, Gould, J. Willis, J. Ashurst, J. Eyre, B. Perryn, B. and Heath, J. who met Nov. 11, 1782.

(*l*) Evans's case, MS. Gould, J. 1 East. P. C. c. 17. s. 5. p. 798, 799. The third section of the 18 Geo. II. c. 30, provides that the act shall not prevent any offender who shall not be tried according thereto from being tried for high treason within this realm according to the stat. 28 Hen. VIII. c. 15.

" assist, or maintain, procure, command, counsel, or advise, " any person or persons whatsoever, to do or commit any " piracies or robberies upon the seas; and such person and " persons shall thereupon do or commit any such piracy or " robbery, then all and every such person or persons what- " soever, so as aforesaid setting forth any pirate, or aiding, " assisting, maintaining, procuring, commanding, counsel- " ling, or advising, the same either on the land or upon the " sea, shall be and are hereby declared, and shall be deemed " and adjudged to be *accessory* to such piracy and robbery, " done and committed; and further, that after any piracy " or robbery is or shall be committed by any pirate or rob- " ber whatsoever, every person and persons, who, knowing " that such pirate or robber has done or committed such " piracy and robbery, shall on the land or upon the sea, " receive, entertain, or conceal, any such pirate or robber, " or receive or take into his custody any ship, vessel, goods, " or chattels, which have been by any such pirate or robber " piratically and feloniously taken; shall be, and are hereby " likewise declared, deemed, and adjudged, to be accessory " to such piracy and robbery." And then the statute directs " that all such accessories to such piracies and rob- " beries shall be inquired of, tried, heard, determined, and " adjudged, after the common course of the laws of this " land, according to the statute 28 Hen. VIII. as the prin- " cipals of such piracies and robberies may and ought to be, " and no otherwise: and being thereupon attainted, shall " suffer such pains of death, losses of lands, goods, and " chattels, and in like manner, as such principals ought to " suffer, according to the stat. 28 Hen. VIII. which is " thereby declared to continue in full force."

But accessories are declared to be principals, and are to be tried accordingly by 8 Geo. I. c. 24.

A subsequent statute, however, makes an alteration with respect to the accessories described in 11 & 12 W. III. and declares them to be principals, and that they shall be tried accordingly. The statute is the 8 Geo. I. c. 24, which in the third section reciting that " whereas there are some " defects in the laws for bringing persons who are acces-

"sories to piracy and robbery upon the seas to condign "punishment, if the principal who committed such piracy "or robbery is not or cannot be apprehended and brought "to justice," enacts, "that all persons whatsoever, who "by the stat. 11 & 12 W. III. are declared to be accessory "or accessories to any piracy or robbery therein men- "tioned, are hereby declared to be principal pirates, fe- "lons, and robbers, and shall and may be inquired of, "heard, determined, and adjudged, in the same manner as "persons guilty of piracy and robbery may, according to "that statute; and being thereupon attainted and convicted, "shall suffer death and loss of lands, &c. in like manner as "pirates and robbers ought by the said act to suffer." And the fourth section of the statute excludes all such offenders from the benefit of clergy.

It has been fully settled that one who knowingly receives and abets a pirate within the body of a county is not triable by the common law, the original offence being cognizable alone by another jurisdiction. (*m*)

Of clergy in cases of piracy, and

The 28 Hen. VIII. c. 15. takes away clergy in the cases of piracy to which that statute applies: (*n*) and some of the

(*m*) Admiralty case, 13 Co. 53. And a little before this case the law appears to have been so considered in the case of one Scadding, who was committed by the court of Admiralty for aiding a pirate to escape out of prison; and on a return to a habeas corpus the prisoner was remanded, though it appeared that the fact was committed by him within the body of a county. The court of K. B. holding, that because Scadding's offence depended on the piracy committed by the principal, of which the temporal judges had no cognizance, and was, as it were, an accessorial offence to the first piracy which was determinable by the admiral, it was a sufficient ground for remanding him. Yelv. 134. 2 East. P. C. c. 17. s. 14. p. 810.

(*n*) See the stat. s. 3. and 2 East. P. C. c. 17. s. 15, p. 810, where the reasons are given why clergy is not extended to this offence by the stat. 1 Ed. VI. c. 12: and 2 Hawk. P. C. c. 33. s. 41, is referred to as distinguishing between such piracies as are committed on the high seas, and those committed in

offences made piracy by subsequent statutes are also expressly excluded from clergy. The statute 4 Geo. I. c. 11. s. 7, enacts that all persons who shall commit any offence for which they ought to be adjudged pirates, felons, and robbers, by the statute 11 & 12 W. III. c. 7, shall be excluded from their clergy. (*o*) And by the 8 Geo. I. c. 24. s. 4, all offenders convicted of any piracy, &c. by virtue of that act are also excluded from clergy. With respect to other offences than piracy committed upon the high seas, the 39 Geo. III. c. 37, makes a provision, after reciting the statute 28 Hen. VIII. c. 15, and the offences thereby directed to be tried under the king's commission, and that it would be expedient to declare that other offences committed on the seas might be inquired of, tried, and determined in like manner. It enacts and declares that all offences which shall be committed upon the high seas out of the body of any county of the realm, shall be (and they are thereby declared to be) offences of the same nature respectively, and liable to the same punishments respectively, as if they had been committed upon shore, and shall be inquired of, heard, tried, determined, and adjudged, in the same manner as treasons, felonies, murders, and confederacies, are directed to be by that statute.

offences committed on the high seas.

SECT. II.

OF THE PLACE IN WHICH THE OFFENCE MAY BE COMMITTED.

THE statute 28 Hen. VIII. c. 15. s. 1, enacts that all treasons, felonies, robberies, murders, and confederacies,

28 Hen. VIII. c. 15. The offence can-

creeks and rivers within the body of a county; considering the latter as within the restoring clause of 1 Ed. VI. c. 12: and as intimating that the distinction will reconcile 11 Rep. 31. b. with the other authorities.

(*o*) It should be observed of this act of Geo. I. that by s. 8. it is not to extend to such as are convicted or attainted in Scotland; but that by s. 9. it is to extend to all the king's dominions in America.

not be committed within the body of a county.

committed in or upon the sea, or in any haven, river, creek, or place, where the admiral has or pretends to have power, authority, or jurisdiction, shall be inquired, tried, &c. in such shires and places, as shall be limited by the king's commission, as if any such offences had been committed upon the land. It is agreed on all hands that the admiral never had jurisdiction in any river, creek, or port, within the body of a county; and that this statute does not extend to offences done in such places; because they are and always were cognizable by the common law: and the words of the statute "where the admiral *pretends* to have power" are not to be extended to such a pretence as is without any right at all. (*p*) And the only question of jurisdiction generally considered at this day upon the statute is, whether the fact happened at any place within the body of a county. If it did, the trial must be had before the ordinary jurisdiction; as the admiral can have no jurisdiction within the body of a county unless by positive statute. (*q*)

High and low water-mark.

It is quite clear, that upon the open sea-shore, the common law and the Admiralty have alternate jurisdiction between high and low water-mark: (*r*) but it is sometimes a matter of difficulty to fix the line of demarcation between the county and the high sea in harbours, or below the bridges in great rivers. The question is often more a matter of fact than of law, and determinable by local evidence: the following general rules upon this point are however collected by Mr. East. "It is plain that the admiral can have no jurisdiction in any rivers, or arms, or creeks of the sea, within the bodies of counties, though within the flux and reflux of the tide; except in the particular instances of mayhem and homicide, done in great rivers beneath the bridges near the sea; which depend upon the statute 15 Ric. II. c. 3. In general it is said

General rules.

(*p*) 1 Hawk. P. C. c. 37. s. 11. 2 Hale 15, 16. 4 Inst. 137. 2 East. P. C. c. 17. s. 10. p. 803.

(*q*) 4 Inst. 137.

(*r*) 3 Inst. 113. 2 Hale 17, and see 2 Hawk. c. 9. s. 14. as to the jurisdiction of the coroner in offences on the sea-shore.

"that such parts of the rivers, arms, or creeks, are deemed "to be within the bodies of counties, *where persons can see* "*from one side to the other*. Lord Hale, in his treatise *De* "*jure maris*, says, that the arm or branch of the sea which "lies within the *fauces terræ*, where a man may *reasonably* "*discern* between shore and shore, is, or at least may be, "within the body of a county. Hawkins however con- "siders the line more accurately confined, by other autho- "rities, to such parts of the sea where a man, standing on "the one side of the land, *may see what is done on the other*; "and the reason assigned by Lord Coke in the Admiralty "case (*s*) in support of the county coroner's jurisdiction, "where a man is killed in such places, *because that the* "*county may well know it*, seems rather to support the more "limited construction. But at least, where there is any "doubt, the jurisdiction of the common law ought to be "preferred." (*t*)

The question, whether the fact was committed on the sea, or within the body of a county, is of main importance. For if it turn out that the goods were taken anywhere within the body of a county, the commissioners under the statute of Hen. VIII. can have no jurisdiction to inquire of it; and if it should appear that the goods were taken at sea and afterwards brought on shore, the offender cannot be indicted as for a larceny in that county into which they were carried; because the original felony was not a taking of which the common law takes cognizance. (*u*)

Shooting from the land, and killing on the sea.

It was decided, that where A., standing on the shore of a harbour, fired a loaded musket at a revenue cutter, which had struck upon a sand bank in the sea, about one hundred yards from the shore, by which firing a person was maliciously killed on board the vessel, it was piracy; for the

(*s*) 13 Co. 52.

(*t*) 2 East. P. C. c. 17. s. 10. p. 803, 804.

(*u*) 2 East. P. C. c. 17. s. 12. p. 805. 3 Inst. 113.

offence was committed where the death happened, and not at the place from whence the cause of death proceeded. (*w*) And if a man be struck upon the high sea, and die upon the shore after the reflux of the water, the admiral, by virtue of his commission, has no cognizance of the offence. (*x*) And as it was doubtful whether it could be tried at common law, it is provided by statute that the offender may be indicted in the county where the party died. (*y*)

Concurrent jurisdiction of the common law and admiralty in Milford haven, &c.

In a late case at the Admiralty session, of a murder committed in a part of Milford Haven, where it was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Hen. VIII. c. 15. do by law extend. Upon reference to the judges they were unanimously of opinion that the trial was properly had. And it is said that during the discussion of the point the construction of this statute by Lord Hale (*z*) was much preferred to the doctrine of Lord Coke; (*a*) and that most, if not all, of the judges, seemed to think that the common law has a concurrent jurisdiction with the Admiralty in this haven, and in all other havens, creeks, and rivers, in this realm. (*b*)

(*w*) 1 Hawk. P. C. c. 37. s. 17. Coombes's case, 1 Leach, 388. 1 East. P. C. c. 5. s. 131. p. 367.

(*x*) 2 Hale 17, 20. 1 East. P. C. c. 5. s. 131. p. 365, 366.

(*y*) 2 Geo. II. c. 21.

(*z*) 2 Hale 16, 17.

(*a*) 3 Inst. 111. 4 Inst. 134.

(*b*) Bruce's case, 2 Leach 1093. It should be observed that this was a case of *murder*. See ante, 141. The statute 15 Rich. II. c. 3. gives the admiral jurisdiction to inquire of the death of a man, and of a mayhem done in great ships hovering in the main stream of great rivers, beneath the bridges of the same rivers nigh to the sea, and in none other places of the same rivers; which jurisdiction is only concurrent with, and not in exclusion of, the common law. 1 East. P. C. 368.

SECT. III.

OF THE COURT BY WHICH THE OFFENCE OF PIRACY MAY BE TRIED.

THE offence of piracy was formerly cognizable only by the Admiralty courts, which proceeded without a jury, in a method much conformed to the civil law. But it being inconsistent with the liberties of the nation that any man's life should be taken away, unless by the judgment of his peers or the common law of the land, the statute 28 Hen. VIII. c. 15. established a new jurisdiction. By that statute it was enacted, that this offence should be tried by commissioners nominated by the lord chancellor, the indictment being first found by a grand jury of twelve men, and afterwards tried by another jury as at common law; and that the course of proceedings should be according to the law of the land. Amongst the commissioners there are always some of the common law judges; (*c*) and by the Admiralty court thus constituted the offence of piracy, and other marine offences, are now tried. But the statute 28 Hen. VIII. merely altered the mode of trial in the Admiralty court; and its jurisdiction still continues to rest on the same foundations as it did before that act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that court a jurisdiction that our common law has not. (*d*)

Times for holding the court. 32 Geo. II. c. 25. s. 20.

The statute 32 Geo. II. c. 25. s. 20. for the more speedy bringing of offenders to justice, &c. enacts, that a session of oyer and terminer and gaol delivery for the trial of offences committed upon the high seas, within the jurisdiction of the Admiralty of England, shall be holden twice at least in every year; viz. in March and

(*c*) Generally *two*. 4 Blac. Com. 269.

(*d*) By Mansfield, C. J. Rex v. Depardo, 1 Taunt. 29.

October, at the Old Bailey; (except when the sessions of oyer and terminer and gaol delivery for London and Middlesex shall be there holden) or in such other places in England as the lord high admiral, &c. shall, in writing under his hand, directed to the judge of the court of Admiralty, appoint.

CHAPTER THE NINTH.

Of neglecting Quarantine, and of spreading contagious Disorders.

SECT. I.

OF NEGLECTING QUARANTINE.

THE performance of *quarantine*, or forty days' probation when ships arrive from countries infected with contagious disorders, is of the highest importance, as it affects the public health of the nation, and has been enforced from time to time by various legislative enactments. The 45th Geo. III. c. 10. is the principal statute upon the subject now in existence, the ninth section of which repeals all other acts relating to quarantine, excepting as to arrears of duty, and as to offences then committed against them.

45 Geo. III. c. 10. s. 10. As to the ships, &c. which shall be liable to quarantine.

This statute first makes certain regulations with respect to the building of a lazaret on *Chetney-hill*, in *Kent*, and providing floating lazarets in the mean time; and imposing certain duties upon the owners of vessels and cargoes performing quarantine. It then proceeds to enact, (*a*) that all ships and vessels coming from, or having touched at, any place from whence his Majesty, by the advice of his privy council, shall have adjudged and declared it probable that the plague, or any other infectious disease or distemper highly dangerous to the health of his Majesty's subjects, may be brought; and all ships, vessels, and boats, receiving any person, goods, &c. baggage, wearing apparel, books, letters, or any other articles whatever, from or out of any

(*a*) S. 10.

ships or vessels so coming from, or having touched at, such infected place as aforesaid (whether such persons, goods, &c. or other articles, shall have come or been brought in such ships or vessels, or such persons shall have gone, or articles have been put on board the same, either before or after the arrival of such ships or vessels at any port or place in *Great Britain*, or the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, and whether such ships or vessels were or were not bound to any port or place in Great Britain, or the islands aforesaid,) and all persons, goods, &c. and other articles whatever on board of any such ships or vessels so coming from, or having touched at, such infected place as aforesaid, or on board of any such receiving ships, vessels, or boats as aforesaid, shall be, and be considered to be, *liable to quarantine* within the meaning of this act, and of any order of council concerning quarantine and the prevention of infection, from the time of the departure of such ships or vessels from such infected place, or from the time when such persons, goods, &c. or other articles, shall have been received on board. And further it enacts, that all such ships, &c. and all persons, (as well pilots as others,) (*b*) goods, &c. and other articles as aforesaid, shall, upon their arrival, be obliged to *perform quarantine* in such place for such time and in such manner as shall be directed by any order in council notified by proclamation, or published in the London Gazette. And that until they shall have performed and shall be duly discharged from such quarantine, no such person, goods, &c. or other articles, shall come or be brought on shore, or go or be put on board any other

(*b*) In a case which occurred upon a quarantine act, now repealed (26 Geo. II. c. 6.) it was held, that a *pilot*, who went on board a ship under quarantine, and quitted her before the quarantine expired, was not within the penalties of the fifth section of the act, which related only to the captain, seamen, and passengers, and did not reach the case of a pilot. But it was also held that a pilot, disobeying orders of council made in pursuance of that statute, might be punished at common law by information. Rex *v.* Harris, 2 Leach 551. 4 T. R. 202.

ship, vessel, or boat, in order to come or be brought on shore, unless in such manner and by such licence as shall be directed or permitted by an order in council. And it is further provided, that all ships, &c. so liable to quarantine, and all persons, (as well pilots as others,) goods, &c. and other articles, and all commanders, &c. of any such ships, vessels, or boats, liable to quarantine, shall be subject to this act, or any order of council concerning quarantine and the prevention of infection.

The statute proceeds to make various regulations as to signals to be used, and other matters for enforcing the observance of quarantine; and creates different offences, some of which being of the degree of capital felonies, require to be particularly noticed.

45 Geo. III. c. 10. s. 19. Commanders, &c. not disclosing infection, or omitting to hoist the proper signal, guilty of felony without clergy.

By section 19, in case any ship or vessel shall come from, or shall have touched at, any infected place, or shall have any person on board actually infected, and the commander, master, or other person, having charge of such ship or vessel, knowing that the place from whence he came, or at which he had touched, was infected, or knowing some person on board to be actually infected, shall refuse or omit to disclose the same upon such examination as is mentioned in the act, or shall wilfully omit to hoist the signal therein directed, to denote that his ship or vessel is liable to the performance of quarantine at the times and on the occasions therein directed with respect to the same, such commander, &c. shall be adjudged guilty of felony, and suffer death without benefit of clergy.

45 Geo. III. c. 10. s. 23. Persons refusing or neglecting to repair to the lazaret, &c. and persons escaping from the same.

The 23d section, reciting that disobedience or refractory behaviour in persons under quarantine, or in other persons who may have had any intercourse or communication with them, may be attended with very great danger to his Majesty's subjects; enacts, that every person liable to perform quarantine, and every person having had any intercourse or communication with a person liable to perform quarantine,

guilty of felony without clergy.

wilfully refusing or neglecting to repair forthwith, when required and directed so to do by the officer mentioned in the act, to the lazaret, ship, or vessel, or place duly appointed in that behalf, and also every person having been placed in the said lazaret, &c. and actually escaping out of the same before quarantine duly performed, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

45 Geo. III. c. 10. s. 26. Officers, &c. permitting persons, ships, &c. to depart from the lazaret, &c. without an order: or giving a false certificate, guilty of felony without clergy.

The 26th section enacts, that if any officer of the customs, or other officer, or person, to whom it shall appertain to execute any order concerning quarantine, or the prevention of infection, notified as mentioned in the act, or to see the same put in execution, shall knowingly and willingly permit any person, ship, vessel, goods, or merchandize, to depart or be conveyed out of the said lazaret, ship, or other place, unless under an order of his Majesty by and with the advice of his privy council, or under an order of three or more of the privy council; or if any person authorized and directed by that act to give a certificate of a ship having duly performed quarantine or airing, shall knowingly give a false certificate thereof; every such person so offending shall be deemed guilty of felony, and suffer death without benefit of clergy.

45 Geo. III. c. 10. s. 27. Persons entering the lazaret, &c. must perform quarantine, and if they escape without performing it are guilty of felony without clergy.

By section 27 it is enacted that if any person not infected nor liable to perform quarantine shall enter the said lazaret, &c. whilst any infected person shall be therein, such person so entering shall perform quarantine there; and in case such person shall actually escape out of the lazaret, &c. where he ought to have performed quarantine, before he shall have fully performed the same, he shall be adjudged guilty of felony, and suffer death without benefit of clergy.

45 Geo. III. c. 10. s. 31. clandestinely conveying or secreting in

The 31st section enacts, that if any person shall clandestinely convey, or shall secrete or conceal, for the purpose of conveying any letters, goods, wares, or merchandize, or other articles therein mentioned, from any ship or vessel

actually performing quarantine, or from the lazaret or other place, where such goods, wares, merchandize, or other articles, shall be performing quarantine, every such person so offending shall be adjudged guilty of felony, and suffer death without benefit of clergy.

order to convey goods, &c. from a vessel or from a lazaret, &c. felony without clergy.

An offence, of a less penal nature, is created by a former section of the statute, (*c*) which, with respect to any person coming in any ship or vessel liable to perform quarantine, or any pilot or other person going on board the same, either before or after its arrival, at any port or place in Great Britain, or the islands mentioned in the act, (*d*) who shall, either before or after such arrival, quit such ship or vessel, by going on shore in any port or place in Great Britain or the said islands, or by going on board any other ship, vessel, or boat, with intent to go on shore as aforesaid, before such ship or vessel, so liable to quarantine, shall be regularly discharged from the performance thereof, enacts that every such pilot or other person, so quitting such ship or vessel so liable to quarantine, shall for every such offence suffer imprisonment for the space of two months, and forfeit the sum of two hundred pounds.

45 Geo. III. c. 10. s. 21. Persons quitting any ship liable to perform quarantine before such ship is regularly discharged to be imprisoned, and forfeit £200.

It is enacted that no attainder of felony by virtue of this act shall work any corruption of blood, or forfeiture of goods or lands. (*e*)

No corruption of blood or forfeiture.

And it is also enacted that the publication in the *London Gazette* of any order in council, or of any order by three or more of the lords or others of the privy council, made in pursuance of the act, or his Majesty's royal proclamation made in pursuance of the same, shall be deemed and taken to be sufficient notice to all persons concerned, of all matters therein respectively contained. (*f*)

Publication of orders of council, &c. in the London Gazette to be sufficient notice.

(*c*) S. 21.
(*d*) *Ante*, p. 150.
(*e*) S. 39.
(*f*) S. 22.

45 Geo. III. c. 10. s. 40. The answers of the commander, &c. are to be evidence of the place from which the vessel came or touched at.

By section 40 of the statute it is enacted, that in any prosecution for any offence against this act, or any act which may hereafter be passed concerning quarantine, or for any breach or disobedience of any order made by his Majesty by the advice of his privy council, concerning quarantine, or preventing infection, notified or published as aforesaid, or of any order made by three or more of the privy council, the answers of the commander, master, or other person, having charge of any vessel, to any questions or interrogatories put to him by virtue and in pursuance of the act, or of any act which may hereafter be passed concerning quarantine, or of any such order as aforesaid, shall be received as evidence so far as the same relate to the place from which such vessel came, or to the place or places at which she touched in the course of her voyage. (*g*) And

(*g*) By s. 18, the superintendant of quarantine or his assistant, or if there be no such persons at the port or place, the principal officer of the customs there, or such officer of the customs as shall be authorized by four or more of the commissioners of the customs, may demand of the commander, &c. of a vessel; and such commander, &c. shall, upon such demand, give a true answer, in writing or otherwise, and upon oath or not upon oath, as shall be required, to all such questions and interrogatories as shall be put to him by virtue and in pursuance of the regulations and directions of an order in council. The refusal to make a true discovery, or giving a false answer when not questioned upon oath, subjects the commander, &c. to a penalty of £200. And by s. 37, where in pursuance of the act any examinations or answers shall be taken or made upon oath, the person, authorized and required to take such examinations and answers, may administer oaths; and persons swearing falsely shall be deemed guilty of perjury: which enactment is further enforced by 46 Geo. III. c. 98. s. 10. With respect to the appointment of superintendants of quarantine, it is enacted by 50 Geo. III. c. 20, that they and their assistants may be appointed by any instruments signed by four commissioners of the customs, and sealed with the seal of their office. And by the 51 Geo. III. c. 46, every thing required by the 45 Geo. III. c. 10, to be done by the superintendant of quarantine or his assistant, may, in case of the absence or sickness of such superintendant or assistant, be done by the princi-

also that where any vessel shall have been directed to perform quarantine by the superintendant of quarantine, or his assistant; or, where there is no superintendant or assistant, by the principal officer of the customs at any port or place, or other officer of the customs authorized to act as mentioned in the statute; the having been so directed to perform quarantine shall be given and received as evidence that such vessel was liable to quarantine, unless satisfactory proof be produced by the defendant to shew that the vessel did not come from, or touch at, any such place or places, as is or are stated in the said answers, or that such vessel, although directed to perform quarantine, was not liable to the performance thereof. And it further enacts, that where any vessel shall in fact have been put under quarantine by the superintendant, &c. and shall actually be performing the same, such vessel shall, in any prosecution, &c. for any offence against this act, or any other act hereafter passed concerning quarantine, or against any orders of council as aforesaid, be deemed liable to quarantine, without proving in what manner or from what circumstances such vessel became liable to the performance thereof.

The having been directed to perform quarantine is to be evidence that the vessel was liable to quarantine, unless the defendant shew the contrary.

Where any vessel shall in fact have been put under quarantine, and shall be performing the same, it shall be deemed liable without proof of the manner in which it became liable.

Section 42 enacts, that all offences contrary to or in violation of that act, or any other act thereafter to be passed, or of any orders of his Majesty in council, then or thereafter to be made, concerning quarantine and the prevention of infection, and notified by proclamation, or published in the London Gazette; or of any orders made by three or more of the privy council as mentioned in the act, whether the said offence shall be committed within the body of any county, or upon the high seas, or elsewhere, shall and may be tried and determined in any county within *England* or *Scotland*, or in the proper courts of the isles of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*.

Places where trial of offences may be had.

pal officer of the customs at the place, or by such officer of the customs as shall be authorized to act in that behalf by four or more of the commissioners of the customs.

Smaller offences for which no specific penalty is provided may be determined by two justices, who may fine or imprison.

The smaller offences against this act, in general, make the party liable to some specific penalty or punishment; but it is enacted that all offences not being felony, and every offence or disobedience to any order of council made for the better carrying the act into execution, for which no specific penalty, forfeiture, or punishment, is provided by the act, shall be tried and determined by two justices of the peace of the county, &c. where such offence or disobedience shall happen: and upon conviction the party shall be liable to such forfeiture and penalty, not exceeding fifty pounds for any one offence, or to such imprisonment not exceeding three months for any one offence, as shall in the discretion of the two justices be judged proper. (*h*)

Persons going within the limits of quarantine stations contrary to order in council to forfeit £500.

By a subsequent statute 46 Geo. III. c. 98. s. 7, reciting the danger of communication with vessels performing quarantine, and that it is greatly increased by persons not being prevented from going within the stations allotted for the performance of quarantine, it is enacted that his Majesty may, by order in council notified by proclamation or published in the London Gazette, prohibit all persons, vessels, &c. from going within the limits of any station assigned for the performance of quarantine; and that the party offending shall for every such offence forfeit five hundred pounds.

(*h*) 45 Geo. III. c. 10. s. 38. A former act concerning quarantine 26 Geo. II. c. 6, enacted that all persons going on board ships coming from infected places, should obey such orders as the king in council should make, but did not award any particular punishment, nor contain any clause like that in the text as to the jurisdiction of two justices: and it was held upon that statute that disobedience of such an order of council was an indictable offence, and punishable as a misdemeanor at common law. Rex v. Harris, 4 T. R. 202. 2 Leach 519.

SECT. II.

OF SPREADING CONTAGIOUS DISORDERS.

Persons infected with the plague going abroad and infecting others.

WITH the same regard to the public health, upon which the statutes relating to quarantine have proceeded, the legislature appears to have acted in former times, in making persons guilty of felony who, being infected with the plague, went abroad and into company, with infectious sores upon them, after being commanded by the magistrates to stay at home. (*i*) The statute which contained this enactment, after being continued some time, is now expired; but Lord Hale puts the question, whether if a person infected with the plague should go abroad *with intent* to infect another, and another be thereby infected and die, it would not be murder by the common law. (*k*) And he seems to consider it as clear, that though where no such intent appears it cannot be murder, yet if by the conversation of such a person another should be infected, it would be a great misdemeanor. (*l*)

It is an indictable offence unlawfully and injuriously to carry a child infected with the small pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects.

In a late case in the court of King's Bench, relating to the small-pox infection, it was held that the exposing in the public highway, with a full knowledge of the fact, a person infected with a contagious disorder is a common nuisance, and as such the subject of an indictment. The defendant was indicted for carrying her child, while infected with the small-pox, along a public highway, in which persons were passing, and near to the habitations of the king's subjects; and having suffered judgment to go by default, it was moved on her behalf, in arrest of judgment, that it was consistent with the indictment that the child might have caught the disease, and that it was not shewn that the act was unlawful, as the mother might have carried it through the street, in order to procure medical advice; and that the indictment ought to have alleged, that there was some sore upon

(*i*) 2 (vulgo 1) Jac. I. c. 31. s. 7. 1 Hale 432, 695. 3 Inst. 90.

(*k*) 1 Hale 432.

(*l*) *Id. ibid.*

the child at the time when it was so carried. It was also urged, that the only offences against the public health of which Hawkins speaks, are spreading the plague and neglecting quarantine; (*m*) and that it appeared that Lord Hardwicke thought the building of a house for the reception of patients inoculated with the small-pox was not a public nuisance, and mentioned that upon an indictment of that kind there had been an acquittal. (*n*) But Lord Ellenborough, C. J. said that if there had been any such necessity as supposed for the conduct of the defendant, it might have been given in evidence as matter of defence; but there was no such evidence; and as the indictment alleged that the act was done *unlawfully* and *injuriously*, it precluded the presumption that there was any such necessity. Le Blanc, J. in passing sentence observed, that although the court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law, that if any one unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects, and indictable as such. That the court did not pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others, so as not to endanger a communication of the disease. But no person, having a disorder of this description upon him, ought to be publicly exposed, to the endangering the health and lives of the rest of the subjects. (*o*)

And it is also an indictable offence in an apothecary,

In a subsequent case in the same court, the indictment was against an apothecary for unlawfully and injuriously inoculating children with the small-pox, and while they

(*m*) 1 Hawk. P. C. c. 52, 53.

(*n*) Anon. 3 Atk. 750. In 2 Chitt. Crim. Law 656, there is an indictment against an apothecary for keeping a common inoculating house near the church in a town: and the Cro. Circ. A. 365, is referred to.

(*o*) Rex *v.* Vantandillo, 4 M. and S. 73.

were sick of it, *unlawfully* and *injuriously* causing them to be carried along the public street. The defendant was found guilty: but it was moved in arrest of judgment, that this was not any offence; that the case differed materially from that of Rex *v.* Vantandillo, as it appeared that the defendant was by profession a person qualified to inoculate with this disease, if it were lawful for any person to inoculate with it. That as to its being alleged that the defendant caused the children to be carried along the street, it was no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essential to their recovery, air and exercise. And it was observed that in Rex *v.* Sutton, (*p*) which was an indictment for keeping an inoculating-house, and therefore much more likely to spread infection than what had been done here, the court said that the defendant might demur.

after having inoculated children, unlawfully and injuriously to cause them to be exposed in the public street to the danger of the public health

But Lord Ellenborough, C. J. said, that the indictment laid the act to be done *unlawfully* and *injuriously;* and that in order to support this statement it must be shewn, that what was done was, in the manner of doing it, incautious, and likely to affect the health of others. That the words *unlawfully* and *injuriously* precluded all legal cause of excuse. And that though inoculation for the small-pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.

And Le Blanc, J. in passing sentence in this case observed, that the introduction of vaccination did not render the practice of inoculation for the small-pox unlawful; but that in all times it was unlawful and an indictable offence to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a place of public resort. (*q*)

And it was always an indictable offence to expose persons infected in places of public resort.

(*p*) 4 Burr. 2116.

(*q*) Rex *v.* Burnett, 4 M. & S. 272. The defendant was sentenced to six months imprisonment.

CHAPTER THE TENTH.

Of Offences against the Revenue Laws, relating to the Customs or Excise.

AMONGST the offences against the revenue laws, that of *smuggling* is one of the principal. It consists in bringing on shore, or in carrying from the shore, goods, wares, or merchandise, for which the duty has not been paid, or goods of which the importation or exportation is prohibited: an offence productive of various mischiefs to society. (*a*) In order to prevent the commission of offences of this kind, many statutes have been passed, which, in addition to the proceedings at common law for assaulting and obstructing revenue officers when acting in the execution of their duties, (*b*) give to those officers extraordinary powers and protections, and punish persons endeavouring to resist or evade the laws relating to the customs and excise. The enactments of those statutes, as they respect the right of revenue officers to search for prohibited or uncustomed articles, the forfeitures of ships and goods, and the penalties which may be incurred by an illegal traffic, are exceedingly numerous; and do not in general fall within the scope and intention of the present work. (*c*) But some of them re-

(*a*) 1 Hawk. P. C. c. 48. s. 1. 4 Blac. Com. 155. 6 Bac. Abr. 258.

(*b*) See many precedents for misdemeanors at common law, in assaulting and obstructing officers of excise and customs, acting in the due execution of their offices. 4 Wentw. 385, *et sequ.* 2 Chit. Crim. Law 127, *et sequ.* And see Brady's case, 1 Bos. and Pul. 188, where it was admitted that the offence charged in the indictment was an offence indictable at common law.

(*c*) The matters to which they relate, are for the most part cognizable by two justices of the peace. By the 49 Geo. III. c. 65. s. 2. it

lating to the resisting and evading the due execution of the revenue laws, create offences of a serious nature, and require to be particularly noticed.

Capital offences, 52 Geo. III. c. 143.

With respect to such offences as are punishable with death, a recent statute, 52 Geo. III. c. 143. reciting, that it was expedient that the provisions contained in any laws then in force for collecting his Majesty's revenue in Great Britain, whereby the penalty of death was imposed for any act done in breach of, or in resistance to, the said laws, or any of them, should be amended and reduced into one act, enacts, "that in all cases where any act to be done or committed after the passing of this act, in breach of or in resistance to any part of the laws for collecting his Majesty's revenue in Great Britain, would, by the laws now in force, subject the offender to death as guilty of felony without benefit of clergy, by virtue of the said laws, or any of them, such act, so to be done or committed, shall be deemed and taken to be felony with benefit of clergy, and punishable only as such, unless the same shall also be declared to be felony without benefit of clergy by this act."

S. 11. three or more persons armed and assembled in order to be aiding and assisting in illegal exportation, &c. or rescuing, &c.

The eleventh section of this statute enacts, "that if any persons, to the number of *three or more, armed with fire-arms or other offensive weapons*, shall hereafter within *Great Britain*, or within the limits of any port, harbour, or creek thereof, or within the isle of *Man*, or within the limits of any port, harbour, or creek thereof, be assembled in order to be aiding and assisting in the illegal exporta-

was provided that justices of peace should not determine any prosecutions for penalties under the acts relating to the customs, where the same exceeded 50*l.* unless empowered by some act of parliament; but this provision was repealed by the 56 Geo. III. c. 104. s. 14. which empowers two justices to determine in all cases of seizure under the laws relating the customs in the same manner as they might by any laws of excise then in force with respect to forfeitures for the breach of any laws of excise.

" tion of wool or other goods prohibited to be exported;
" or in the carrying of wool, or other such goods, in order
" to such exportation; or in the illegal running, landing, or
" carrying away prohibited or uncustomed goods, or goods
" liable to pay any duties which shall not have been paid or
" secured; or in the illegal relanding of any goods what-
" soever, which shall have been shipped or exported
" upon debenture or certificate, or from any warehouse
" wherein such wool or other goods shall have been depo-
" sited under any act of parliament for the securing the
" home consumption duties thereon; or in rescuing or
" taking away any such wool or other goods as aforesaid
" after seizure, from any officer or officers of the customs or
" excise, or other officer or officers authorized to seize the
" same, or other person or persons employed by him or
" them, or assisting him or them, or from the place where
" the same shall have been lodged by him or them; or in
" rescuing any person who shall have been apprehended for
" any of the offences made felony by any act relating to the
" revenues of customs or excise of *Great Britain;* or in
" preventing the apprehending any person who shall have
Or being so aiding or assisting; " been guilty of any such offence; or in case any persons,
" to the number of three or more, so armed as aforesaid,
" shall hereafter within *Great Britain*, or within the limits
" of any port, harbour, or creek thereof, or within the isle
" of *Man*, or within the limits of any port, harbour, or
And any person shooting at a ship or boat; " creek thereof, be so aiding and assisting; or if any person
" shall maliciously shoot at or upon any ship, vessel, or boat
" belonging to his Majesty's navy, or in the service of the
" customs or excise within the limits of any port, harbour,
" or creek of Great Britain, or within the isle of *Man*, or
" within the limits of any port, harbour, or creek thereof,
" or in any port of the British or Irish channels, or on the
" high seas, within one hundred leagues of the coast of
nd any person shooting at, maiming, &c. any officer, &c. " Great Britain or Ireland; or if any person shall either on
" shore or on the water, within the limits last aforesaid, ma-
" liciously shoot at, maim, or dangerously wound any officer
" or officers of his Majesty's army, navy, marines, militia,

" or volunteers, or any other his Majesty's military or naval " forces, or of the customs or excise, or any other person or " persons aiding or assisting any such officer or officers, " when acting in the due execution of his or their duty, " under any of the powers, authorities, or provisions, of any " act relating to the revenues of customs or excise of Great " Britain, or of any act for the prevention of smuggling; " every person so offending, and every person aiding, abet- " ting, or assisting therein, shall, being thereof convicted, " be adjudged guilty of felony, and shall suffer death as a " felon without benefit of clergy." (*d*)

Guilty of felony without clergy.

By the same statute also, the refusal of an offender to surrender himself to justice within a limited time, after being required to do so by an order of council, is, in certain cases, made a capital offence. The twelfth section enacts, " that " if any person shall be charged by information on oath " before any justice of the peace, or other person competent " to take such information in any part of the united king- " dom, with being guilty of so assembling, aiding, or assist- " ing, or of so maliciously shooting, maiming, or wounding " as aforesaid, within the limits hereinbefore respectively " specified, in any case wherein any such officer as aforesaid, " or any person aiding or assisting any such officer in the " execution of his duty as aforesaid, shall have been killed, " such information shall be forthwith certified by the justice

Refusal on neglect of offenders to surrender in certain cases, after being required by order in council, felony without clergy. S. 12.

(*d*) The same section also enacts, as to the place of trial, that offences committed within any port, harbour, creek, haven, or roadstead of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, respectively, may be tried in the said islands; and that offences committed elsewhere out of the united kingdom, may be tried in any county of the united kingdom; and that offences committed within *England*, *Scotland*, or *Ireland* respectively, may be tried within such part of the united kingdom in which such offence shall have been respectively committed; but in any county or shire of such part of the said united kingdom, in such manner and form as if the offence had been committed in the county or shire in which the same shall be tried.

" or other person taking the same, under his hand and seal,
" to one of his Majesty's principal secretaries of state, who
" shall forthwith lay the same before his Majesty in his privy
" council; and his Majesty may thereupon, if he shall so
" think fit, by his order in council, require and command
" the person so charged with such offence, that he do, with-
" in the space of sixty days, or such longer time as to his
" Majesty shall seem fit, after the publication of such order
" in the London Gazette, *surrender himself* to the lord
" chief justice, or any other justice of the King's Bench,
" or to any justice of the peace, or other person competent
" to take such surrender as in such order shall be specified;
" and may further order and require such order to be pro-
" claimed by the sheriff of the county where the offence shall
" have been committed, if committed within any county of
" the united kingdom; and if not committed within any
" such county, then by the sheriff of any county near to the
" place wherein the offence shall have been committed; and
" the clerks of his Majesty's privy council shall cause such
" order to be forthwith printed and published in the London
" Gazette, and such publication to be repeated once in
" every week after such first publication, until the expira-
" tion of the said sixty days, or such other time as shall be
" appointed by such order for the surrender of such offen-
" der; and shall also cause a copy of such order, attested by
" the signature of one of the said clerks, to be transmitted
" to the sheriff of the county specified in such order, who
" shall, within fourteen days after the receipt of such copy,
" cause the same to be proclaimed, between the hours of ten
" in the morning and two in the afternoon, in the respec-
" tive market places, upon the respective market days of
" two market towns, in the same county, if there shall be
" two such towns; and if there shall be only one such town,
" then in such town, and in some other place of general
" resort within such county; and shall also cause a true copy
" of such copy of such order to be affixed upon some public
" place in each of such market towns, or other place where

"such proclamation shall be made; and if the person "charged with such offence as aforesaid shall surrender "himself according to such order, the justice or other per- "son to whom he shall so surrender shall commit him to "some gaol or prison within the limits of his jurisdiction, "to be there dealt with according to law; but if such per- "son so charged and proclaimed as aforesaid, *shall not so "surrender himself* within the time limited in such order, "or shall after surrender and before trial for such offence "*escape* from justice, such person shall, from the day ap- "pointed for such surrender, be adjudged to be a person "*attainted of felony, and shall suffer death as a felon, without "benefit of clergy*, if the offence shall be charged to have "been committed in *England*, or within the limits of any "port, harbour, or creek in *England* or *Ireland*, or within "one hundred leagues of the coast thereof; and it shall "be lawful for the court of King's Bench, or the jus- "tices of oyer, or general gaol delivery, or great sessions "for the county or place where such offender shall be, "to award execution against such offender, in such man- "ner as if he had been convicted and attainted in the "said court of King's Bench, or before such justices of "oyer and terminer or general gaol delivery, or great ses- "sions respectively; and if the offence shall be charged to "have been committed in *Scotland*, or within any port, "or harbour, or creek thereof, or within one hundred "leagues of the coasts thereof, such offender shall in the "like case be adjudged, deemed, and taken to be convicted "of a capital crime, and shall suffer the pain of death and "confiscation of moveables, as in the case of a person "found guilty of a capital crime, and under sentence for "the same; and it shall be lawful for the court of jus- "ticiary, or the lords of justiciary in their circuits in "*Scotland*, to award execution against such offender, in "such manner as if he had been found guilty and con- "demned in the said courts of justiciary, or circuit courts "respectively."

Execution may be awarded.

19 Geo. II. c. 34.

Many of the provisions of the eleventh section of this statute (*e*) are contained in a former statute, 19 Geo. II. c. 34. s. 1. which extends also to any person having his face blacked, or wearing any vizard, mask, or other disguise, when passing with illegal goods, or forcibly hindering, obstructing, assaulting, opposing, or resisting any of the revenue officers in the seizing or securing such goods. (*f*) That statute also contains provisions of a similar nature to those of the twelfth section of the 52d Geo. III. c. 143. as to proceedings against offenders required to surrender, but neglecting or refusing to do so; making such neglect or refusal, and also an escape after surrender, offences punishable with death. (*g*) The other offences created by the first section of that statute were also capital, but are now within clergy, by the operation of the statute 52 Geo. III. c. 143. s. 1.; (*h*) and for the most part seem to be repealed by the later statute. (*i*)

(*e*) *Ante*, p. 161.

(*f*) This statute was continued by 26 Geo. II. c. 32. 32 Geo. II. c. 10. 4 Geo. III. c. 12. 11 Geo. III. c. 51. 19 Geo. III. c. 69. 28 Geo. III. c. 23. 36 Geo. III. c. 40. s. 13. and made perpetual by 43 Geo. III. c. 157. A question appears to have been raised whether the 28 Geo. III. c. 23. did continue this statute, as it did not properly recite its title. A part of the title of the 19th Geo. II. c. 34. is "an "act to indemnify certain persons "upon the terms *in this act* men- "tioned, and *for relief* of officers, "&c." but the 28th Geo. III. c. 25. recites the title a little differently, "upon the terms *therein* mention- "ed, and *for the relief* of officers, "&c." but the court held that the 19th Geo. II. c. 34. was continued; for the legislature, in continuing a statute, is not bound to use any particular form of words. Longmead's case, 2 Leach 694.

(*g*) 19 Geo. II. c. 34. s. 2. declared to be continued by 19 Geo. III. c. 69. s. 23. With respect to the proceedings on the surrender clause of this statute, see Fost. 51, 56, 57.

(*h*) *Ante*, p. 161.

(*i*) And the clause relating to the hindering, obstructing, resisting, &c. revenue officers, was virtually repealed as to the felony by 19 Geo. III. c. 69. s. 10. which made that offence a misdemeanor. *Per Cur.* in Hutchinson's case, 1 Leach 342. But the 45th Geo. III. c. 121. s. 11. makes the assaulting, resisting, hindering, &c. by force and violence any officer, &c. in the

Some of the points decided upon the 19th Geo. II. c. 34. are, however, deserving of notice, as they may assist in the construction of the statute 52 Geo. III. c. 143. It begins by enacting, "that if any persons, to the number of three or "more, armed with fire arms, or other offensive weapons, "shall be assembled in order to be aiding and assisting in "the illegal exportation of goods, &c." in similar words to those of the 52d Geo. III.; upon which clause it has been decided, that in order to bring offenders within its penalties, they must be armed with weapons which may properly be called *offensive*. (*k*) It seems, that a person catching up a *hatchet* accidentally, during the hurry and heat of an affray, is not armed with an offensive weapon within the meaning of the act; (*l*) and in one case it was held, that *large sticks* about three feet long, with large knobs at the end, with several prongs, the natural growth of the stick, arising out of them, were not offensive weapons; and that from the preamble of the statute the weapons must be such as the law calls dangerous. (*m*) But in a subsequent case the court said, that although it was difficult to say what should or should not be called an offensive weapon, it would be going a great deal too far to say that nothing but guns, pistols, daggers, and instruments of war, should be so considered; and that bludgeons properly so called, clubs, and any thing that is not in common use for any other purpose but a weapon, are clearly offensive weapons within the meaning of the legislature. (*n*) In a case upon a former statute, 9 Geo. II.

Points decided upon that statute.

What shall be deemed an offensive weapon.

execution of the powers given by that act, felony in any person who shall commit the offence.

(*k*) Hutchinson's case, 1781, 1 Leach 342.

(*l*) Rose's case, Old Bailey, *May* 1784, before Willes, J. and Perryn, B. 1 Leach 342. note (*a*).

(*m*) Ince's case, Old Bailey, *Feb.* 1785. By Gould, J. Perryn, B. and Mr. Recorder. 1 Leach 342. note (*a*).

(*n*) Cosans's case, Old Bailey, *May* 1785. In this case it was contended, upon the authority of Ince's case, that very large club sticks, such as people ride with, to defend themselves, are not offensive weapons; and on its being left to the jury, the prisoner was acquitted. 2 Leach 342, 343. note (*a*).

c. 35. s. 10. where the same words "armed with fire arms, or other offensive arms or weapons," occur, it was held that a person armed only with a *common whip* was not an offender within the meaning of the act; though he aided and assisted other persons who were armed with fire arms and weapons which were clearly offensive. (*o*) But with respect to the latter part of this judgment a different doctrine appears to have been held by Lord Mansfield upon the 19th Geo. II. c. 34. who is reported to have said, that where a person was assembled, together with others who were armed, and was active, it was not necessary that such individual should be armed. (*p*)

As to the assembling.

As to the *assembling* within the statute 19 Geo. II. c. 34. it has been held, that it must be *deliberate*, and for the purpose of committing the offence. So that where a set of drunken men came from an ale-house, and hastily set themselves to carry away some Geneva, which had been seized by the excise officers, it was thought very questionable whether the object which the legislature had in view could be extended to such a case. And the Court said, that the words of the statute manifestly allude to the circumstance of great multitudes of persons coming down upon the beach of the sea for the purpose of escorting uncustomed goods to the places designed for their reception. (*q*)

Being disguised.

It was also the opinion of the Court upon that clause of the 19th Geo. II. c. 34. which relates to a person having his face blacked, or wearing any disguise, (*r*) that it apparently

(*o*) Fletcher's case, 1 Leach 23.

(*p*) Franklin's case, 1 Leach 255. S. C. Cald. 244. But *qu.*

(*q*) Hutchinson's case, 1 Leach 343. The court offered the Attorney General a special verdict upon this case; but he declined to take it, and the prisoners were acquitted. This construction of the statute, as to the assembling being *deliberate*, and for the purpose of committing the offence, is stated to have been adopted by Willes, J. and Hotham, B. in Spice's case, Old Bailey, *December* 1785, and by Heath, J. in Gray's case, Old Bailey, *July* in the same year. 1 Leach 343, note (*a*).

(*r*) *Ante*, p. 166.

had no regard to the number of persons, nor to their being armed with offensive weapons; and therefore that an individual passing disguised with uncustomed goods, would in all probability be deemed within the penalties of the act; and that the branch of the statute relating to the "forcibly hindering, obstructing, &c." being coupled by the word "or" to the preceding sentence, seemed to be a clause that would reach any individual who should forcibly hinder or obstruct a revenue officer in the execution of his duty. But they held, that this last offence was by the 19th Geo. III. c. 69. s. 10. reduced to a misdemeanor punishable by corporal punishment, and the felony thereby virtually repealed. (*s*)

Forcibly obstructing, &c.

The other statutes, which relate to acts committed in breach of, or in resistance to, the revenue laws, and create offences which are not the subject of capital punishment, (*t*) may now be noticed in the order in which they were enacted.

Other statutes.

The 13th and 14th Car. II. c. 11. s. 6. reciting, that officers of the customs and their deputies had been hindered, affronted, abused, beaten, and wounded, to the hazard of their lives, in the execution of their offices, by armed companies and multitudes of men, enacts, that where any officer shall be by any person, armed with club or any manner of weapon, forcibly hindered, affronted, abused, beaten, or wounded as aforesaid, either on board any ship or vessel, or upon the land or water, in the due execution of his office, the person so resisting, &c. the officer or his deputy, or such as shall act in their aid or assistance, shall be committed till the quarter sessions; and at the quarter sessions the justices are empow-

13 and 14 Car. II. c. 11. s. 6. as to hindering, wounding, &c. officers, by persons armed.

(*s*) Hutchinson's case, 1 Leach 342. The 45th Geo. III. c. 121. s. 11. makes the assaulting, resisting, hindering, &c. by force and violence any officer, &c. in the execution of the powers given by that act, felony in any person who shall commit the offence.

(*t*) That punishment being taken away by the 52d Geo. III. c. 143. except in cases within that act. *Ante*, p. 161.

ered to punish the offender by a fine not exceeding 100*l.* and the offender is to remain in prison till discharged by order of the Exchequer both of the fine and imprisonment, or discover the person that set him on work.

6 Geo. I. c. 21. s. 34. Persons armed and tumultuously assembling to the number of eight, and hindering, &c. officers, to be transported.

By the 6th Geo. I. c. 21. s. 34. it is enacted, that if any officer of the customs be forcibly hindered, wounded, or beaten, in the due execution of his office, by any persons armed with club or any manner of weapon, tumultuously assembled in the day or night, to the number of eight or more persons, all and every such person or persons so forcibly hindering, &c. or such as shall act in their aid or assistance, shall be transported for any term not exceeding seven years. (*u*)

8 Geo. I. c. 18. s. 6. Persons passing with foreign goods landed without entry within 20 miles of the coast, being five in company, or armed or disguised, and hindering, &c. officers in seizing run goods, guilty of felony, and to be transported for seven years.

By the 8th Geo. I. c. 18. s. 6. all persons who shall be found passing (knowingly and willingly) with any foreign goods or commodities landed without due entry and payment of the duties within twenty miles of the coast, and shall be more than five persons in company, or shall carry any offensive arms or weapons, or wear any disguise, or shall forcibly hinder or resist any of the officers of the customs or excise in seizing or securing run goods, shall be deemed and taken to be runners of foreign goods within the meaning of this act, and shall be adjudged guilty of felony, and transported for seven years. (*x*)

(*u*) And such offenders returning from transportation before the expiration of the term are made guilty of felony without clergy, s. 35. Section 36 provides, that if any offender shall, in two months after his offence, and before conviction, discover two or more of his accomplices, so as two at least be convicted, he shall have 40*l.* reward for each convicted, and be acquitted of his own offence. And by s. 37. it is provided, that if any other person shall in three months discover any offender or offenders so as to be convicted, he shall have 40*l.* for each convicted, over and above any other reward, on account of the run goods.

(*x*) By the same section, return from transportation before the expiration of the seven years, is made felony without clergy. The seventh section provides, that if any runner shall, in two months after his offence, and before conviction,

The 9th Geo. II. c. 35. s. 10. reciting that dissolute persons frequently appeared in great gangs near the sea coasts and shores of navigable rivers, and the adjacent towns and villages, and in other parts of the kingdom, carrying fire arms or other offensive weapons, to the great terror of his Majesty's subjects, and the hindrance of officers, &c. in order to be aiding and assisting in the clandestine running, landing, or carrying away prohibited and uncustomed goods, and to rescue the same after seizure; and that officers and their assistants had been wounded, and some of them murdered, in the execution of their offices, and great quantities of goods rescued; for preventing thereof enacts, that upon information upon oath before a justice of the peace, that any persons to the number of three or more, are or have been assembled for any of the purposes aforesaid, and are or have been armed with fire arms, or other offensive arms or weapons; (*x*) such justice shall grant his warrant to the constables, &c. requiring them to take to their assistance as many of his Majesty's subjects as may be thought necessary for apprehending the persons against whom such information shall be given. The act then proceeds to empower such justice to commit the offenders to gaol; and then enacts, that such persons, upon due proof of their being assembled and armed as aforesaid, in order to be aiding and assisting in the clandestine running, landing, rescuing, or carrying away prohibited or uncustomed goods, upon conviction shall be adjudged guilty of felony, and be transported for seven years. (*y*)

9 Geo. II. c. 35. s. 10. Persons, to the number of three or more, assembled to be aiding and assisting in the clandestine running, &c. of goods, and armed, may be apprehended by the warrant of a justice: and upon conviction are to be adjudged guilty of felony, and transported for seven years.

discover his accomplices, so as two or more be convicted, he shall have a reward of 40*l.* for every offender convicted, if the value of the run goods exceed 50*l.* and he shall be acquitted. And by the eighth section any other person discovering any one offender in three months, so as he be convicted, shall have in like manner 40*l.* for every such offender, over and above what he may be entitled to on account of the said run goods, so as the value of the said run goods exceeds 150*l.*

(*x*) *Ante*, p. 167.

(*y*) The same section provides, that persons returning before the expiration of the term shall suffer as felons, without benefit of clergy.

9 Geo. II. c. 35. s. 13. Persons, to the number of two or more, passing with horses, carts, &c. laden with tea, &c. and armed or disguised, or forcibly hindering, &c. officers, shall be taken as runners of foreign goods within 8 Geo. I. c. 18. and being convicted shall be guilty of felony, and transported for seven years.

Section 13. of the same statute, reciting that the laws had hitherto proved insufficient for preventing the carrying prohibited and uncustomed goods through the country with an armed force, enacts, that all persons who, to the number of two or more in company, shall be found passing within five miles from the sea coast, or from any navigable river, with one or more horse or horses, or with any cart or carriage whereon there shall be laden or put more than six pounds of tea, or brandy or other spirits exceeding the quantity of five gallons, not having paid the duties, and not having a permit, or any other foreign goods or commodities above the value of 30*l.* landed without due entry and payment of the duties, and shall carry any offensive arms or weapons, (*z*) or wear any disguise when passing with such goods, or shall forcibly hinder, obstruct, assault, oppose, or resist, any officers in seizing or securing any sort of prohibited, uncustomed, or run goods, or other the execution of their office, shall be taken to be runners of foreign goods within the statute 8 Geo. I. c. 18. although no proof shall be given that such tea, brandy, &c. were run or had not been duly entered, and paid the duties; the proof of such entry and payment, and of the manner in which the persons found with such goods, &c. came by them, being to lie wholly on such persons. The section then enacts, that such offenders being convicted, shall be adjudged guilty of felony, and transported for seven years. (*a*)

Section 11 gives a reward of 50*l.* to persons maimed in apprehending such offenders, and 50*l.* to the executors of persons killed in apprehending them. By the twelfth section offenders discovering two or more accomplices three months after the offence, to the commissioners of the customs, &c. are to be discharged and entitled to 50*l.* reward.

(*z*) *Ante*, p. 167.

(*a*) By section 14, all the goods so found, and all weapons and arms, and all the furniture of their horses, cattle, and carriages, and the chests and other packages, shall be forfeited. The 15th section enacts, that if any officer shall be wounded by such offender in the execution of his office, or any officer or other person shall be wounded in apprehending, or endeavouring to apprehend, or making pursuit after such offenders, they shall upon conviction receive a reward

Section 28 of the same statute enacts, that if any officer, being on board any ship, &c. within the limits of any of the ports of this kingdom, be forcibly hindered, opposed, obstructed, wounded, or beaten in the execution of his office or duty, every person so forcibly hindering, &c. and all such as shall act in aid or assistance, being convicted, shall be transported for a term not exceeding seven years. (*b*)

9 Geo. II. c. 35. s. 28. Persons forcibly hindering, &c. officers, being on board any ship, &c. their aiders, &c. to be transported.

The 24th Geo. II. c. 40. s. 28. enacts, that if any persons, to the number of five or more, shall, in a tumultuous and riotous manner, assemble themselves to rescue any offenders against this or any other act relating to spirituous liquors or strong waters, or for licensing the retailers thereof, or to assault, beat, or wound any person or persons who shall have given, or be about to give, any information or evidence against, or shall have discovered or given evidence against, or shall seize, or bring to justice, any person or persons offending against this or any of the said former acts; or forcibly to oppose the execution of any of the powers given by this act; all persons so assembling, their aiders and abettors, shall be guilty of felony, and liable to pains and penalties as in cases of felons; and the courts before which they shall be convicted shall have power to transport them for seven years.

24 Geo. II. c. 40. s. 28. Persons riotously rescuing offenders against the acts relating to spirituous liquors, &c. or assaulting informers, guilty of felony, and may be transported for seven years.

The 19th Geo. III. c. 69. s. 9. enacts, that if any persons to the number of two or more in company shall be found passing in any part of this kingdom with any horse, cart, or

19 Geo. III. c. 69. s. 9. Persons, to the number of two or more, pass-

of 50*l.*; and that in case any person shall be killed in apprehending or making pursuit after such offenders, their executors or administrators (upon certificate under hand and seal of the justice of assize for the county where the fact was done, or the two next justices of the peace, of such person being so killed,) shall have 50*l.* over and above any other reward they may be entitled to by this act. By section 16, a reward of 50*l.* is given to persons discovering any offender who shall be convicted; so that the discovery be made within three months after the offence committed.

(*b*) And if they return before the expiration of the term, shall suffer as felons without benefit of clergy. S. 28.

ing with horse, cart, &c. on which there shall be tea, &c. armed or disguised, may be arrested and committed till the quarter sessions.

carriage, whereon there shall be put more than six pounds weight of tea, or foreign brandy, or other foreign spirituous liquors exceeding five gallons, not having paid the duties, and not having a permit; and shall carry any offensive arms or weapons, or wear any disguise when passing with such tea, &c. as aforesaid, any officer of the customs or excise, or person acting in his aid, may arrest the persons so passing, and may convey them before a justice of the peace, who may commit them to the next county gaol till the next quarter sessions, to be tried as afterwards directed.

19 Geo. III. c. 69. s. 10. Persons assaulting, &c. officers in seizing goods, or rescuing goods, or destroying casks, &c. may be arrested and conveyed before a justice, and committed till the quarter sessions.

The tenth section of the same statute enacts, that if any person shall assault, resist, oppose, molest, obstruct, or hinder, any officer of the customs or excise in due seizing or securing any coffee, tea, cocoa nuts, chocolate, foreign brandy, or other foreign spirituous liquors, or any other goods which by any such officer shall be liable to be seized by virtue of or in pursuance of any act then in force; or shall by force or violence rescue, or cause to be rescued, any of the said goods, after the same shall have been seized by such officer, or shall attempt or endeavour so to do; or after such seizure shall cut, stave, break, or otherwise destroy or damage any casks, vessels, boxes, or package wherein the same respectively shall have been contained; the officers of the customs and excise, and all persons acting in their aid, may arrest such offender, and convey him before a justice of peace near the place; and the justice may commit him to the next county gaol until the next quarter sessions, to be tried as afterwards directed. (*c*)

19 Geo. III. c. 69. s. 12. As to the trial and

With respect to the trial of these offences at the quarter sessions, the twelfth section of the statute enacts, that the

(*c*) By section 11, the officers who convey the offender before the justice are, in case he shall be committed, to enter into a recognizance in the sum of 40*l.* to appear at the quarter sessions and prosecute; and the commissioners of customs and excise are directed to order the charges of prosecution to be paid out of any money in the hands of the receiver general of the customs and excise.

justices at the quarter sessions may try and determine them; and that if the persons committed shall be duly convicted of any offence against this act, the justices may, in lieu of any other punishment to which such offenders might be liable for the same offence by any former act, commit such persons to hard labour in the house of correction of the county, city, town, or place, for a term not exceeding three years, nor less than one year. It is also provided by subsequent sections of the statute, that if any person so convicted shall be deemed a proper person to serve his Majesty by land or sea, the justices shall deliver him over to the proper officer; and that if the justices at the time of convicting shall not be attended by a proper officer, they may adjourn and give notice thereof to such officer who is required to attend in person or by deputy at such adjournment. (*d*)

punishment of offenders so committed till the quarter sessions.

The 24th Geo. III. c. 47. s. 15. enacts, that if any officer of the navy, or in the service of the customs or excise, being on shore or going on board, or being on board or returning from on board any ship, boat, or vessel within the limits of any of the ports of this kingdom, or within four leagues from the coasts, shall be hindered, opposed, obstructed, or assaulted in the execution of his office, either in the day time or night; the offender, and all such as shall act in his aid, may be conveyed before a justice of peace residing near the place: and the justice may commit such person to the next county gaol, there to remain until the next court of oyer and terminer, great session or gaol delivery, or until such person shall be delivered by due course of law. It is further enacted, that in case an indictment is found against such person, he shall plead to it without having time to traverse, as is usual in cases of misdemeanors; and being duly convicted, shall be sentenced to hard labour on the river Thames, or other navigable river in England, for any term not exceeding three years, according to the statute 19 Geo.

24 Geo. III. c. 47. s. 15. Persons hindering, opposing, &c. officers, may be committed to gaol, and being convicted, may be sentenced to hard labour, or committed to the house of correction for three years.

(*d*) And see further as to the proceedings upon delivery of such convicted persons to the officer. S. 16.

III. c. 74. and as is by the said act directed, for the punishment of persons convicted of grand larceny; or such court may order such offender to be committed to the common gaol or house of correction for any term not exceeding three years. But it is provided, that persons charged with obstructing officers, whose offence falls within the provisions of 19 Geo. III. c. 69. may be committed, if the justice thinks fit, until the next quarter sessions; and in such case the offender shall be tried and punished as by that act is directed. (*e*)

This section of the statute extends to excise officers, when executing their duty on land.

A point was made on an indictment upon this statute for assaulting an excise officer in seizing a quantity of soap, he being *on shore*, in the execution of his duty, that the offence was not within the statute; that it was an offence against other statutes relating to the excise laws, but not against this statute, which was expressly made to prevent smuggling. But upon a case reserved the judges were all of opinion that the intention of the legislature was, that all officers of the navy, the customs, or the excise, acting in the execution of their respective duties, whether they are so acting on land or on the sea within the limits and under the circumstances described in the statute, are within the protection of this clause; and that they are so protected as well while they are duly engaged in preventing smuggling by seizing uncustomed goods, as while they are protecting the excise by securing the duties on soap, or any other excise commodity by which the public revenue may be increased. The words in the act "being on *shore*," are equivalent to the words "being on *land*;" and that if, as contended on behalf of the prisoner, the statute was intended to protect custom-house officers only, it would be difficult, and indeed impossible,

(*e*) *Ante*, p. 164, 165. The 24th Geo. III. c. 47. proceeds to enact, that offences committed in *England* or *Wales* may be tried in any county in such manner as if the fact had been committed within such county, s. 17; and gives directions as to the proceedings where offences are committed in *Scotland*, s. 17.

to account why the words excise officers were introduced at all. (*f*)

And it is not repealed by the 24 G. III. c. 48. s. 10.

Another question was raised in the same case by the prisoner's counsel, namely, whether this statute of 24 Geo. III. c. 47. s. 15, was not virtually repealed as to the subject of this seizure by the subsequent statute 24 Geo. III. c. 48. s. 10, which imposes a penalty of £50 upon soap-makers obstructing officers of excise; (*g*) but the judges were of opinion that it was not so repealed. (*h*)

Transporting sheep or wool out of the kingdom usually called *owling*.

The clandestine transportation of sheep or wool out of the kingdom to the detriment of its staple manufacture, called *owling* from its being usually carried on in the night, was forbidden at common law, (*i*) and made the subject of criminal prosecution by different statutes, beginning with the 11th Ed. III. c. 1. when the importance of the woollen manufacture became first a subject of attention. But the statute 28 Geo. III. c. 38, repeals all former acts relating to this offence (except so much of the 9 & 10 W. III. c. 40, as relates to wool within ten miles of the sea side in *Kent* or *Sussex*, and to persons residing within fifteen miles of the sea in those counties), and after imposing various

(*f*) Brady's case, 2 Leach 803. S. C. 1 Bos. & Pull. 187. England's case, 2 Leach 808, note (a).

(*g*) It enacts that if any maker or makers of soap shall obstruct or hinder any officer of excise in the execution of the powers or authorities given by that or any other act, for the ascertaining or securing the duties upon soap, the offender shall for every such offence forfeit the sum of £50.

(*h*) Brady's case, 2 Leach 803. And see the note (b) where it appears that, on the argument on this part of the case, the prisoner's counsel (Mr. Serj. Runnington), cited Rex *v.* Cator, 1 Leach 274, note (a) and Rex *v.* Davis, 1 Leach 271. but that Heath, J. said that in those cases the statutes by which former statutes were held to be repealed were passed in subsequent sessions; and that where both statutes are passed in the same session the latter is only explanatory. It does not appear from the report of Brady's case, that Brady was a maker of soap.

(*i*) 4 Blac. Com. 154. Mirr. c. 1. s. 3.

penalties and forfeitures for conveying sheep or wool out of the kingdom, proceeds to create an offence in the opposing any person putting the act in execution.

28 Geo. III. c. 38. s. 56. Persons hindering, &c. officers seizing sheep, wool, &c. or being armed or disguised and rescuing sheep, wool, &c. to be transported.

Section 56 of the statute enacts, that if any person whosoever putting the act in execution shall be hindered, opposed, obstructed, molested, wounded, or beaten, in seizing or attempting to seize any sheep, wool, woolfels, woolflocks, mortlings, shortlings, or any other species of goods enumerated in the act, by any person whomsoever, either in the day or night, by land or water, which were intended to be exported, or which were carrying on board any ship or vessel contrary to this act; the person or persons who shall so hinder, &c. and also all and every other person or persons whatsoever being armed with offensive arms or weapons, (*k*) or wearing any disguise, who shall rescue or attempt to rescue any sheep, wool, or other the goods aforesaid which shall have been seized according to the directions of the act, being convicted, shall be transported for a term not exceeding seven years. (*l*)

45 Geo. III. c. 121. s. 11. Persons assaulting, &c. officers in the execution of the powers of this act, guilty of felony, and may be transported or imprisoned.

The 45 Geo. III. c. 121. s. 11. enacts, that if any person whatsoever shall by force or violence assault, resist, oppose, molest, obstruct, or hinder, any officer of the army, navy, or marines, or any officer of the customs or excise, or any person or persons aiding or assisting in the due execution of the powers and authorities by that act given or granted, such offender, being convicted, shall be adjudged a felon,

(*k*) As to what shall be considered an offensive weapon, see ante, p. 167.

(*l*) And by the same section such offenders returning before the expiration of the time shall suffer as felons without benefit of clergy. The 60th section enacts that in all prosecutions under the act, it shall not be necessary for the prosecutor to prove that such sheep were of the breed of this kingdom, or that such wool was of the growth of this kingdom, but that they shall be taken so to be unless the contrary be proved by the defendant. By section 77, prosecutions must be commenced within three years next ensuing the offence committed.

and transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and kept to hard labour for any term not exceeding three years. The section then proceeds to make the shooting at any ship or officers in the execution of their duty felony without clergy; but these offences are comprised in the later statute 52 Geo. III. c. 143. (*m*)

Making lights, &c. on the coast as signals to smuggling vessels.

It was found that the illicit importation and fraudulent landing of goods were facilitated, and great hazard and danger occasioned to persons navigating vessels on the coasts of Great Britain, by the temporary lights and blazes made on the shores as private signals to smuggling vessels; and an attempt was made to prevent such acts by imposing upon the persons committing them a pecuniary forfeiture. (*n*) But this proving ineffectual, a subsequent statute, 47 Geo. III. sess. 2. c. 66. s. 34, has made the offence a misdemeanor punishable by forfeiture of 100*l.* or, at the discretion of the court, by imprisonment. That statute enacts, that "no person shall after sun-set and before sun-"rise between the twenty-first day of September and the "first day of April, or after the hour of eight in the even-"ing and before the hour of six in the morning between "the last day of March and the twenty-second day of Sep-"tember, make, or aid, or assist in the making, or be pre-"sent for the purpose of aiding or assisting in the making, "any light, fire, flash, or blaze, or any signal by smoke, or "by any rocket, fireworks, flags, firing of any gun or other "fire-arms, or by any other contrivance or device in or on "board, or from any ship, vessel, or boat, or on or from "any part of the coast or shores of Great Britain, or within "six miles of any part of such coast or shores, for the pur-"pose of making or giving any signal to any person on "board any smuggling ship, vessel, or boat, whether such "person so on board of such ship, vessel, or boat, be or be

47 Geo. III. sess. 2. c. 66. s. 34. makes the offence a misdemeanor punishable by fine or imprisonment.

(*m*) *Ante*, p. 161.

(*n*) 42 Geo. III. c. 82. s. 6. repealed by 47 Geo. III. sess. 2. c. 66. s. 34.

"not within sight or distance to see or hear any such light, "fire, flash, blaze, or signal:" and that any person offending shall be guilty of a misdemeanor. The statute also provides, that the offender may be arrested and conveyed before a justice of peace, who may commit him to the next county gaol until the next court of oyer and terminer, great session or gaol delivery, or until he shall be delivered by due course of law: and that he shall plead to any indictment or information found or filed against him, and be tried thereon without having time to traverse, as is usual in cases of misdemeanor. And that, being duly convicted, he shall, by order of the court before which he shall be convicted, either forfeit and pay one hundred pounds, or, at the discretion of such court, be sentenced to or committed to the common gaol or house of correction, there to be kept to hard labour, for any term not exceeding one year. (*o*)

Evidence as to the purpose of the light, &c. and as to any vessel hovering off the shore.

The statute provides that, upon a charge or indictment for this offence, the burthen of proof that the light, &c. charged as having been made with intent and for the purpose of giving such signal, was not made with such intent and purpose, shall be upon the defendant. (*p*) And it is also enacted, with respect to the evidence in these proceedings, that it shall not be necessary to prove on any indictment or information, that any ship, vessel, or boat, was actually hovering or off the coast or shore, or found or discovered to have been within any limits or distances mentioned in that act, or any other acts passed for the prevention of smuggling. (*q*)

An indictment may be

It was recently decided, that an offender may be indicted

(*o*) S. 34.

(*p*) S. 35.

(*q*) S. 34. The 36th section relates to the bailing, by justices of the peace, of persons apprehended for offences against this act, or the 42 Geo. III. c. 82., or the 45 Geo. III. c. 121. The 37th section enacts, that all persons may enter lands, and extinguish signals by fire, &c.

upon this statute at the *quarter sessions*, though the 34th section mentions only a commitment "until the next court "of oyer and terminer, great session, or gaol delivery," and does not name the quarter sessions. And it was also decided, that if the indictment be removed into the court of King's Bench, and the defendant be tried and convicted before a judge at Nisi Prius, the court of King's Bench is to award the sentence. (*r*)

preferred at the quarter sessions; and if it be removed into the court of K. B. and the defendant be tried and convicted at Nisi Prius, the court of K. B. shall award sentence.

The 48 Geo. III. c. 84. s. 9. enacts, that all persons being subjects of his Majesty, who shall voluntarily and without licence or other sufficient lawful authority, and without any sufficient excuse, proceed and sail in any ship, vessel, or boat, to any road or harbour upon the coast of any of his Majesty's enemies, or shall be found in any ship, &c. lying on the coast, or in any road or harbour of any country belonging to his Majesty's enemies, without any such licence, or authority, or sufficient excuse as aforesaid, or under the protection of any batteries or other force on such coasts, or under the protection of any vessel belonging to his Majesty's enemies, having on board, or having had on board on such voyage, or being in such harbour or upon such coast, or under the protection of such batteries, with intent to take on board any spirits, tea, tobacco, or snuff, shall be deemed guilty of felony, and be liable to be transported for any term not exceeding seven years.

48 Geo. III. c. 84. s. 9. Persons on an enemy's coast, or under an enemy's protection, having on board or intending to take on board spirits, tea, tobacco, or snuff, guilty of felony, and liable to transportation.

And such offence may be alleged, laid, inquired of, and tried, in any county, shire, or stewartry, of this realm. (*s*)

Trial in any county, &c.

The powers and authorities of revenue officers, and persons assisting them to act against persons obstructing them in the execution of their duties, are declared and enacted by several statutes. By the 9th Geo. II. c. 35. s. 35. if any person passing as mentioned in the act (*t*) with prohibited or

Powers of officers and persons aiding them, to use force for force, and to arrest offenders.

(*r*) Rex *v.* Cock, 4 M. and S. 71.
(*s*) S. 10.
(*t*) S. 13. See *ante*, p. 172.

uncustomed goods, and armed, shall hinder or resist any officer who in the execution of his duty shall endeavour or offer to search for or seize any such goods from any person so passing and armed, by beating, maiming, or wounding him, or any person acting in his assistance, all officers and all persons called to their assistance, who are so resisted, may oppose force to force, and endeavour, by the same methods that are violently used against them, and by which their lives are endangered, to defend themselves, and execute the duty of their office. (*u*) The 19th Geo. III. c. 69. s. 8. enacts, that officers, and persons acting in their assistance, may arrest and detain all persons who shall be found aiding or assisting in unshipping to be laid on land any tea, foreign brandy, or other foreign spirituous liquors, or any goods or merchandize whatever (the customs and other duties not being first paid or secured) which were or might be prohibited to be imported; and shall forthwith convey such persons before a magistrate residing near the place where the offence shall be committed. And the next section of the statute empowers the officers and their assistants to proceed in the same manner where any persons to the number of two or more in company shall be found passing in any part of the kingdom with a horse, cart, or carriage, whereon there shall be laden or put more than six pounds of tea, or foreign brandy, or other foreign spirituous liquors exceeding the quantity of five gallons, not having paid the duties, nor having a permit, and shall carry any offensive arms or weapons, or wear any disguise. They may arrest and detain any person or persons so passing, and convey them before a justice of the peace. (*w*)

Powers of the officers of cus-

It should be observed, that by the 45th Geo. III. c. 121.

(*u*) And the section further provides, that in any proceedings against such officers and their assistants for acts done by them in such case they may plead the general issue; and magistrates are required to admit them to bail.

(*w*) And in each case the justice may commit to the next county gaol until the next quarter sessions. S. 8, 9.

s. 16. the powers of the officers of customs and excise under that act, or any act then in force, for the protection of the revenues of customs and excise or prevention of smuggling, were extended to all commissioned officers of the army, navy, or marines. And by the 47th Geo. III. sess. 2. c. 66. s. 16. the powers in that act, or any other act, in relation to the making of any seizures by any officers of the army, or to the arresting or detaining any man liable to be arrested or detained under any act for the prevention of smuggling, are extended to all officers of the *militia* while embodied, or of the volunteers or other military forces while on service, and subject to any act for the punishment of mutiny and desertion. The 30th section of the same statute empowers any warrant or other non-commissioned officer, not being below the rank of a serjeant in the army, who shall be approved of by the commanding officer for the time being of his regiment, as proper and qualified for the service, to patrole with any number of soldiers under his command, for the purpose of preventing illicit practices on the revenue, and to seize, without having any deputation or commission from the commissioners of customs or excise, any vessel, or boat, cart, carriage, or cattle, or any goods, &c. subject to forfeiture by that or any other act then in force for any offence against the revenue of customs or excise: provided that such warrant or non-commissioned officer, on the making of any such seizure, shall bring the same, or cause it to be brought, without loss of time or unnecessary delay, to the nearest custom-house; and shall in all respects, in regard to the prosecution or delivery of any such seizure, conform to the rules and restrictions to which the officers of customs and excise were then subject in case of such seizures. And doubts being entertained whether such non-commissioned officers were empowered to arrest and detain persons liable to be arrested and detained under the laws in force for the prevention of smuggling, the 48th Geo. III. c. 84. s. 8. enacts, that all the powers, &c. contained in any act for the prevention of smuggling in relation to the stopping, arresting, and detaining persons liable to be stopped under the

toms and excise extended to officers of the army, navy, marines, militia, &c. and to certain warrant and non-commissioned officers.

recited act, (47 Geo. III. sess. 2. c. 66.) or any other act passed for the prevention of smuggling, shall extend to the warrant and non-commissioned officers approved by the commanding officer to patrole for the purpose of preventing illicit practices on the revenue, under the said recited act.

Commanders of vessels, &c. may require other vessels, liable to seizure or examination, to bring to; and if they do not, (a signal gun being first fired,) may shoot at them.

The commanders of vessels of the navy, and vessels employed for the prevention of smuggling, are also empowered to force other vessels liable to seizure or examination to bring to, when required, by the serious proceeding of *firing at them*. This power was formerly given by the 24th Geo. III. c. 47. s. 23. and was extended by the 47th Geo. III. sess. 2. c. 66. s. 32. to vessels seizable under that act, or any acts then in force, or any subsequent act in relation to the customs or excise, or for the prevention of smuggling; and is again given with some little variation in the recent statute, 56 Geo. III. c. 104. s. 8. By this last statute it is provided, that in case any ship or vessel, liable to seizure or examination by that or any other act of parliament in force, shall not bring to, on being required so to do, or being chased by any ship or vessel in his Majesty's navy, having the proper pendant and ensign of his Majesty's ships hoisted, or by any ship or vessel employed in the prevention of smuggling under the authority of the commissioners of the treasury, the commissioners of the admiralty, or the commissioners of the customs or excise, having a pendant and ensign hoisted of such description as his Majesty, by order in council, or by proclamation under the great seal, shall, from time to time, in that behalf order and direct, the captain, master, or other person having the charge or command of such ship or vessel in the navy, or employed as aforesaid, (first causing a gun to be fired as a signal,) may shoot at, or into, such ship or vessel so liable as aforesaid. And such captain, &c. and every person acting in his aid and assistance, is thereby indemnified and discharged from any penalties or actions; and if any person shall be wounded or killed by means of such firing, and the captain, &c. be

prosecuted or brought before any justices, or persons having competent authority, such justices and persons are required to admit them to bail.

Evidence of persons being exciseofficers, and goods being uncustomed.

In a case where the indictment stated that the prosecutors were excise officers, and the goods seized uncustomed goods, a question was made as to the necessary *evidence* to support those averments. No evidence was given, but what was to be collected from the testimony of the prosecutors themselves; and it was submitted to the court, that being facts positively alleged, they ought to be directly and substantially proved. In answer to the first point, the statute 11 Geo. I. c. 30. s. 32. was produced, by which it is enacted, that if any question shall arise, whether any person be an officer of the excise or customs, proof that such person was reputed to be, and had acted in, and in fact exercised such office without producing the particular commission, &c. by which he was appointed, shall be good evidence, unless the contrary be made to appear. As to the second point, it was admitted that reasonable proof ought to be given of their being uncustomed goods; and that the circumstances under which they were seized were sufficient for the jury to exercise their judgments upon with respect to the fact. (*x*) In another case it was said by Buller, J. that though excise and custom-house officers fall under a different consideration from peace officers, justices of the peace, constables, &c. yet even in their cases evidence was admitted, both in criminal and civil suits, to shew that the party was a reputed officer, prior to the 11 Geo. I. c. 30. s. 32. (*y*) With respect to the proof of duties having been paid, it is enacted by 12 Geo. I. c. 28. s. 8. that if any foreign goods shall be seized for non-payment of duties, or any other cause of forfeiture, and any dispute shall arise, whether the customs or duties have been paid, or they have been lawfully imported, or le-

(*x*) Shelley's case, 1 Leach 340. note (*a*).

(*y*) Berryman *v.* Wise, 4 T. R. 366. And see *post*, Book VII. *On Evidence.*

gally compounded for, or condemned, or concerning the place from whence they were brought, the proof thereof shall lie on the owner or claimer of such goods, and not on the officer by whom they were seized.

As to excise officer having a warrant.

In a case upon the 24 Geo. III. c. 47. s. 15. one of the objections taken was, that as by the statutes 23 Geo. II. c. 21. s. 34. and 5 Geo. III. c. 43. s. 20. excise officers are directed to procure a warrant previous to their entering any place whatsoever, for the purpose of seizing soap hid or concealed, the prosecutor should have had a warrant in this case; and that not having been cloathed with the authority required, he was not obstructed "in the due execution" of his duty. But three of the judges (*z*) are reported to have expressed themselves very clearly of opinion that this point could not be supported. (*a*)

Place of trial for offences against the revenue laws.

For the better and more impartial trial of any indictment or information for any assault committed upon any of the officers of the customs and excise, the 9 Geo. II. c. 35. s. 26. enacts, that such offence shall be tried in any county in *England*, in such manner and form as if the offence had been therein committed. But upon this clause it has been decided, that it extends only to revenue officers *quà* officers: and a defendant having been found guilty, on an indictment, of a *common assault* on the prosecutor, who was an excise officer, the court of King's Bench arrested the judgment, though the prosecutor was described to be an excise officer, the offence being laid in Surrey, and the venire in Middlesex. (*b*) The 19 Geo. II. c. 34. s. 5. contains a similar enactment as to any offence made felony by that act, or any other act relating to the revenues of customs or excise. By the 24 Geo. III. c. 47. s. 15. offences against that act committed in *England* or *Wales*, or *Berwick upon Tweed*, or

(*z*) Lord Kenyon, Ch. J. Eyre, C. J. and Macdonald, Ch. B.

(*a*) Brady's case, 1 Bos. and Pul. 189. 2 Leach 805. *ante*, p. 177. note (*f*) and (*h*).

(*b*) Rex *v.* Cartwright, 4 T. R. 490.

within the limits of any of the ports thereof, may be tried in any county of England or Wales, as if the fact had been committed within such county. And by the 43 Geo. III. c. 159. for the better and more impartial trial of any indictment or information for any of the offences made felony by the acts recited in that statute, (*c*) it is enacted, that every such offence shall be tried in any county in England, in such manner and form as if the fact had been therein committed. (*d*) By the 45 Geo. III. c. 121. s. 12. every offence made felony by that act committed within any port, harbour, creek, haven, or roadstead, of the islands of Guernsey, Jersey, Alderney, or Sark, shall be tried in the said islands; and every offence committed elsewhere out of the united kingdom may be tried in any county of the united kingdom; and every offence committed within *England*, *Scotland*, or *Ireland*, respectively, may be tried within any county of that part of the kingdom in which such offence shall have been committed, in such manner and form as if the offence had been committed in the county in which the same shall be tried. And offences against the 48 Geo. III. c. 84. s. 9. may be tried in any county of this realm. (*e*)

By the 48 Geo. III. c. 84. s. 8. reciting that by the 47 Geo. III. sess. 2. c. 66. s. 44. justices of the peace are empowered to take cognizance of offences and forfeitures committed or arising on the high seas, and without the limits of any county, city, &c. and that it was expedient that like power should be given to the court of King's Bench, and to justices of oyer and terminer and gaol delivery respectively, it is enacted, that in all cases in which the court of King's Bench, or any justice of oyer and terminer or gaol delivery, are empowered to take cognizance of any assault, or ob-

(*c*) 19 Geo. II. c. 34. 26 Geo. II. c. 32. 32 Geo. II. c. 10. 4 Geo. III. c. 12. 11 Geo. III. c. 51. 19 Geo. III. c. 69. 28 Geo. III. c. 23. 36 Geo. III. c. 40.

(*d*) S. 2. The section proceeds to provide, that no attainder for any of the offences made felony by the said recited acts shall make corruption of blood, loss of dower, or forfeiture of lands, &c.

(*e*) By section 10. of the statute.

struction of any officer of the customs or excise, army, navy, or marines, or of any felony, or other offence against, or of any forfeiture incurred under, any acts then in force, or thereafter to be made relating to the revenue of customs or excise, it shall be lawful for the said court of King's Bench, or justice of oyer and terminer or gaol delivery respectively, to take cognizance of such assault or obstructions, felonies, offences, or forfeitures, as if the same had been committed or incurred on land within the respective jurisdictions of the said court or justices. The 52 Geo. III. c. 143. section 11. enacts, that every offence against that section, which shall be committed within any port, harbour, creek, haven, or roadstead, of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, respectively, shall be tried in the said islands; and every such offence committed elsewhere out of the united kingdom shall be tried in any county of the united kingdom; and every such offence committed within *England*, *Scotland*, or *Ireland*, respectively, shall be tried within such part of the said united kingdom in which such offence shall have been respectively committed; but in any county or shire of such part of the said united kingdom, in such manner and form as if the offence had been committed in the county or shire in which the same shall be tried.

CHAPTER THE ELEVENTH.

Of Hindering the Exportation of Corn, or Preventing its Circulation within the Kingdom.

Of hindering the exportation of corn by violence.

THE 11 Geo. II. c. 22. s. 1. recites that persons had assembled in great numbers, committed great violences, and done many injuries, with intent to hinder the exportation of corn, whereby many of his Majesty's subjects had been deterred from buying corn and grain, and following their lawful business therein, to their great loss and damage, as well as to the great damage and prejudice of the farmers and landholders of this kingdom, and of the nation in general. It then enacts, "that if any person or persons "shall wilfully and maliciously beat, wound, or use any "other violence to or upon any person or persons, with "intent to deter or hinder him or them from buying of corn "or grain in any market, or other place within this king-"dom; or shall unlawfully stop or seize upon any waggon, "cart, or other carriage, or horse loaded with wheat, flour, "meal, malt, or other grain, in or on the way to or from "any city, market-town, or sea-port, of this kingdom; and "wilfully and maliciously break, cut, separate, or destroy, "the same or any part thereof, or the harness of the horses "drawing the same; or shall unlawfully take off, drive "away, kill, or wound, any of such horses; or unlawfully "beat or wound the driver or drivers of such waggon, cart, "or other carriage, or horse, so loaded in order to stop the "same; or shall by cutting of the sacks, or otherwise, "scatter or throw abroad such wheat, flour, meal, malt, or "other grain; or shall take or carry away, spoil or damage, "the same, or any part thereof;" such offenders being convicted before two justices of the peace of the county, &c.

in which the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol, or to the house of correction, there to be kept to hard labour for any time not exceeding three months, nor less than one month; and shall by the same justices be also ordered to be once publicly whipped by the master or keeper of the gaol or house of correction in such city, market-town, or sea-port, in or near to which such offence shall be committed, at the market-cross or market-place there, between the hours of eleven and two o'clock.

Persons committing these offences a second time, or destroying granaries or the corn therein, or entering any vessel, &c. and spoiling grain intended for exportation, guilty of felony.

By the second section of this statute, "if any person or "persons so convicted, shall commit any of the offences "aforesaid a second time; or if any person or persons shall "wilfully and maliciously pull, throw down, or otherwise "destroy, any storehouse or granary, or other place where "corn shall be then kept in order to be exported; or shall "unlawfully enter any such storehouse, granary, or other "place, and take and carry away any corn, flour, meal, or "grain therefrom; or shall throw abroad, or spoil the same, "or any part thereof; or shall unlawfully enter on board "any ship, barge, boat, or vessel, and shall wilfully and "maliciously take and carry away, cast or throw out there-"from, or otherwise spoil or damage, any meal, flour, wheat, "or grain, therein intended for exportation;" every such offender being convicted, shall be adjudged guilty of felony, and transported for seven years; and if such offender shall return before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. (*a*)

(*a*) Section 3, provides that attainder shall not work corruption of blood, loss of dower, or disinheritance: and by section 4 no person, who shall be punished for any offence by virtue of this act, shall be punished for the same offence by any other law or statute. Sections 5, 6, 7, and 8. relate to actions by persons against the hundred for damages done to their properties by offenders against the act.

The statute 36 Geo. III. c. 9. s. 1. recites that persons had assembled themselves in great numbers, and committed great violences, with intent to hinder the passage of corn and grain from place to place, whereby the necessary circulation of corn and grain within the kingdom might be prevented: and then enacts "that if any person or persons "shall wilfully and maliciously beat, wound, or use any "other violence to or upon any person or persons with "intent to deter or hinder him or them from buying of corn "or grain in any market, or other place within this king- "dom; or shall unlawfully stop or seize any wheat, flour, "malt, or other grain, in or on the way to or from any city, "market-town, or place in this kingdom; or shall wilfully "and maliciously break, cut, or destroy, any waggon, cart, "or other carriage, wherein any such wheat, flour, meal, "malt, or other grain, shall be loaded, or the harness of any "horse or horses drawing or carrying the same; or shall "unlawfully take off from any such carriage, or drive away, "kill, or wound, any such horse or horses; or unlawfully "beat or wound the driver or drivers of any such waggon, "cart, or such other carriage or horse so loaded, with intent "to stop such wheat, flour, meal, malt, or other grain; or "shall, by cutting of the sacks or otherwise, scatter or "throw abroad any such wheat, flour, meal, malt, or other "grain; or shall take or carry away, destroy, spoil, or "damage, the same or any part thereof;" such offenders being convicted before two justices of the peace of the county, &c. wherein the offence is committed, or before the justices of the peace in open sessions, (who are thereby authorized and empowered summarily and finally to hear and determine the same,) shall be sent to the common gaol, or house of correction, to be kept to hard labour for any time not exceeding three months, nor less than one month.

Persons using violence to deter others from buying corn within the kingdom, or stopping any corn, breaking waggons, &c. carrying corn, or taking off the horses, or beating the drivers, or scattering or taking corn, to be imprisoned.

The second section enacts, "that if any such person or "persons so convicted shall commit any of the offences "aforesaid a second time; or if any person or persons with "intent to prevent or hinder any corn, meal, flour, malt, or

Persons committing these offences a second time, or with intent to prevent corn,

&c. from being removed, destroying granaries, &c. or taking therefrom corn, &c. or spoiling the same, or entering any ship, barge, &c. and taking therefrom or spoiling corn, &c. guilty of felony, and to be transported.

"grain, from being lawfully carried or removed from any "place whatsoever, shall wilfully and maliciously pull, "throw down, or otherwise destroy, any storehouse or gra- "nary, or other place, in which corn, meal, flour, malt, "or grain, shall be then kept; or shall unlawfully enter "any such storehouse, granary, or other place, and take "and carry away any corn, flour, meal, malt, or grain, "therefrom; or shall throw abroad or spoil the same or "any part thereof; or shall unlawfully enter on board any "ship, barge, boat, or vessel, and wilfully and maliciously "take and carry away, cast, or throw out therefrom, or "otherwise spoil or damage, any corn, flour, meal, malt, or "grain therein;" every person so offending, and being convicted, shall be adjudged guilty of felony, and be transported for seven years; and if such offender shall return into this kingdom before the expiration of the seven years, he or she shall suffer death as a felon without benefit of clergy. The section further provides that attainder shall not work corruption of blood, loss of dower, or disinheritance of heirs. And by the sixth section it is provided that nothing contained in the act shall abridge or take away any provision already made by the law of the realm, for the suppression or punishment of any offence whatsoever, mentioned or described in this act; and it is provided also, that no person who shall be punished by virtue of this act, shall be punished for the same offence by virtue of any other law or statute whatsoever. (*b*)

(*b*) Sections 3, 4, and 5. relate to proceedings against the hundred for damages done to the properties of persons, by offenders against this act.

CHAPTER THE TWELFTH.

Of Seducing Artificers.

IN the early part of the last century, it was found that foreigners, and subjects confederating with foreigners, had enticed artificers and manufacturers to leave the kingdom, by contracting to give them greater wages and advantages than they could reasonably expect to gain here; and by making them large promises, and using other arts to inveigle and draw them away: and it was apprehended that by such practices many great and profitable branches of the trades and manufactures of the kingdom might be transplanted into foreign countries. An act of parliament was therefore passed to prevent this evil.

5 Geo. I. c. 27. s. 1. Persons seducing artificers to go to foreign countries, shall be fined and imprisoned; and for a second offence shall be further fined and imprisoned for twelve months.

The 5 Geo. I. c. 27. s. 1. enacts that "if any person "shall contract with, entice, endeavour to persuade, or so- "licit, any manufacturer or artificer of or in wool, iron, "steel, brass, or any other metal, clock-maker, watch- "maker, or any other artificer or manufacturer of Great "Britain, to go out of this kingdom into any foreign coun- "try out of his Majesty's dominions," such offender being convicted upon indictment or information in any of the courts at Westminster, or at the Assizes, or general gaol delivery or Quarter Sessions for the county, &c. where such offence shall be committed, shall be fined £100 for the first offence, according to the discretion of the court, and shall be imprisoned for three months, and until such fine shall be paid: and if any person having been once convicted, shall offend again, and be convicted a second time of the like offence, he shall be fined at the discretion of the

court, and be imprisoned for twelve months, and until such fine shall be paid. (*a*)

Artificers not returning when warned by the ambassador, &c. incapable of taking legacies or lands, &c. and to be deemed aliens.

The third section of this statute makes any artificer who shall go into a foreign country, there to exercise his trade, or shall be there exercising his trade, and shall not return within six months after warning given him by the ambassador, &c. and from thenceforth continually inhabit within the realm, incapable of taking any legacy, or being an executor or administrator, and incapable of taking any lands. It also imposes forfeiture of all lands, goods, and chattels; and enacts that the offender shall be deemed an alien out of his Majesty's protection.

It is said to have been decided upon this statute, that if a defendant be convicted on one information for having seduced four different artificers, yet the court can only inflict one penalty. (*b*)

23 Geo. II. c. 13. s. 1. Any

Notwithstanding the penalties of this act, artificers in the woollen and other manufactures were seduced into fo-

(*a*) By section 2, prosecutions must be begun within 12 months after the offence committed. The 4th section enacts that upon complaint on oath, that any person is endeavouring to seduce any such artificer out of the dominions, or that any such artificer has contracted, or is preparing to go, a justice of peace may issue his warrant to apprehend the person complained of; and the justice may bind the person charged to appear at the next assizes, &c. with reasonable sureties; and in case the person shall refuse or neglect to give such security, the justice may commit for the assizes or quarter sessions at his election. This section further provides that in case any artificer be convicted upon any indictment, of any promise or contract, or preparation, to go beyond the seas, such person shall give such security not to depart as the court shall think reasonable, and be imprisoned till such security be given. Offenders in *Scotland* are to be prosecuted in the court of justiciary or circuits there.

(*b*) 1 Hawk. P. C. c. 87. s. 6. Rex *v.* Metcalfe, 4 Burr. 2026.

reign parts; and it was found necessary to make some further provision on the subject. The 23 Geo. II. c. 13. was therefore passed, the first section of which enacts, that "if "any person shall contract with, entice, persuade, or en- "deavour to persuade, solicit, or seduce, any manufacturer, "workman, or (*c*) artificer, of or in wool, mohair, cotton or "silk; or of or in any manufactures made up of wool, mo- "hair, cotton or silk; or any of the said materials mixed "one with another; or of or in iron, steel, brass, or any "other metal; or any clock-maker, watch-maker; or any "other manufacturer, (*d*) workman, or artificer, of or in any "other of the manufactures of Great Britain or Ireland, "of what nature or kind soever, to go out of this kingdom, "or out of the kingdom of *Ireland*, into any foreign coun- "try not within the dominions of, or belonging to, the "crown of *Great Britain*," (*e*) such offender being convicted upon any indictment or information in the court of King's Bench, or by indictment at the Assizes, or gaol delivery for the county, &c. wherein the offence shall be com-

person enticing, &c. manufacturers to go to foreign countries shall be fined £500, and be imprisoned 12 months; and upon any second or subsequent conviction shall forfeit £1000, and be imprisoned two years.

(*c*) In a case upon this statute it was moved in arrest of judgment, that the words in the indictment were in the copulative "workman "*and* artificer;" whereas in the statute they are in the disjunctive "*or*;" but this point was abandoned on shewing cause. Rex *v.* Myddleton, 6 T. R. 740.

(*d*) It was also objected in the same case of Rex *v.* Myddleton, that the manufacture mentioned in the indictment, was not one of those enumerated in the statute; but this was also abandoned, the statute saying "or any other ma- "nufacturer, &c."

(*e*) In Rex *v.* Myddleton, another objection on the motion in arrest of judgment was, that the indictment charged *America* generally to be out of the king's dominions, which is notoriously otherwise; that the court will take notice that some parts of *America* are within the dominions of the crown; and that it ought to have stated to what country in *America* the manufacturer was enticed. But the court held that there was no ground for the objection, and said, "It is alleged in the indictment, "and found by the jury, that the "defendant contracted with the "manufacturer to go to a foreign "country called *America*, not "being within the dominions of "the crown. Non constat but "that there may be some place "called America besides the con- "tinent of America." 6 T. R. 740.

mitted in *England*, or by indictment in the court of justiciary, or any of the circuit courts in *Scotland*, or by indictment or information in the court of King's Bench at *Dublin*, shall for every artificer, workman, or manufacturer, contracted with, enticed, &c. forfeit the sum of five hundred pounds, and shall also suffer imprisonment for twelve calendar months, and until such forfeiture be paid. And any person so again offending shall, upon every second or other subsequent conviction, forfeit for every person so contracted with, enticed, &c. the sum of one thousand pounds, and shall also suffer imprisonment for two years, and until such forfeiture be paid. The second section of the statute provides, that prosecutions shall be commenced within twelve calendar months next after the offence committed. (*f*)

Where a defendant had been convicted upon the 5 Geo. I. c. 27. and the 23 Geo. II. c. 13. the sentence of the court was that he should be fined £500, and be imprisoned twelve months; and Lord Mansfield said that the latter act seemed to be a repeal of the former, and that it was made to supply the deficiencies of the former. And Mr. J. Aston observed, that by the latter act there is no discretion left in the court; the punishment directed in it being peremptory. (*g*)

22 Geo. III. c. 60. s. 1. Persons enticing or endeavouring to seduce any artificer or workman employed in printing calicoes, &c. or in making blocks, &c. for such manufactory, to go beyond the

It was afterwards thought necessary to make further enactments, in order to prevent artificers and others employed in the business of printing calicoes, cottons, muslins, and linens, with wooden blocks and metal plates, from departing or being seduced to depart out of the kingdom. The statute 22 Geo. III. c. 60. s. 1. enacts that "if any "person shall contract with, entice, persuade, or endeavour "to seduce or encourage, any artificer or workman con- "cerned or employed, or who shall have worked at or been "employed in printing calicoes, cottons, muslins, or linens

(*f*) This statute s. 3. *et sequ.* contains regulations and penalties relating to the exportation of tools and utensils used in the woollen and silk manufactures.

(*g*) Rex *v.* Cator, 4 Burr. 2026.

" of any sort; or in making or preparing any blocks, plates, " engines, tools, or utensils, for such manufactory to go out " of *Great Britain* to any part beyond the seas;" and shall be convicted upon indictment or information in the court of King's Bench, or by indictment at the assizes or general gaol delivery for the county or place wherein the offence shall be committed, or the offender reside, or by indictment in the court of justiciary, or any of the circuit courts in *Scotland;* such person shall, for every artificer so contracted with, enticed, persuaded, encouraged, or seduced, or attempted so to be, forfeit £500, and be committed to the common gaol for twelve calendar months, and until such forfeiture shall be paid. And in case of a subsequent offence of the same kind, the person so again offending shall, upon the like conviction, forfeit for every person so contracted with, enticed, persuaded, encouraged, or seduced, or attempted so to be, £1000; and shall be committed for two years, and until such forfeiture be paid. (*h*) The second section provides that prosecutions shall be commenced within twelve months next after the offence shall be committed.

seas, shall forfeit £500 and be imprisoned for 12 months.

And for a subsequent offence shall forfeit £1000 and be imprisoned two years.

The statute also imposes penalties upon the exportation of the blocks, plates, engines, tools, or utensils, used in these manufactories; and contains regulations for preventing such practices.

The 25 Geo. III. c. 67. which contains many enactments inflicting penalties, and in some cases imprisonment, upon persons engaged in the exportation of tools and utensils made use of in the iron and steel manufactures, also makes provision for preventing artificers and others engaged in those manufactures from being seduced to depart out of the kingdom. The sixth section enacts " that if any per-

25 Geo. III. c. 67. s. 6. Persons seducing workmen in the iron or steel manufactories to go beyond the seas, shall forfeit £500 and be imprisoned for 12 months.

(*h*) One moiety of the forfeitures inflicted by this act is to go to the king, and the other moiety to the person who shall sue and prosecute for the same.

" son shall contract with, entice, persuade, or endeavour to " seduce or encourage, any artificer or workman concerned " or employed, or who shall have worked at or been em- " ployed in the iron or steel manufactures in this kingdom, " or in making or preparing any tools or utensils for such " manufactory, to go out of Great Britain to any parts be- " yond the seas (except to *Ireland*);" and shall be convicted upon indictment or information in the court of King's Bench, or by indictment at the assizes, or general gaol delivery, or quarter sessions for the county or place wherein the offence shall be committed, or the offender reside; or by indictment in the court of justiciary, or any of the circuit courts in *Scotland*, as the case may be; such person shall for every artificer so contracted with, enticed, persuaded, encouraged, or seduced, or attempted so to be, forfeit the sum of £500, and be committed to gaol for twelve calendar months, and until such forfeiture shall be paid. And in case of a subsequent offence of the same kind, the person so again offending shall, upon the like conviction, forfeit for every person so contracted with, enticed, persuaded, encouraged, or seduced, or attempted so to be, the sum of £1000, and be committed to gaol for two years, and until such forfeiture shall be paid. (*i*) The seventh section provides, that prosecutions shall be commenced within twelve calendar months next after the offence committed.

And for a subsequent offence shall forfeit £1000, and be imprisoned for two years.

Persons seducing colliers to be punished as persons seducing manufacturers.

By the 39 Geo. III. c. 56. s. 8. " all persons seducing " or attempting to seduce colliers, or others aforesaid, (*k*) " from the kingdom of *Great Britain*, shall be punished in " the same manner as persons seducing, or attempting to " seduce, manufacturers or other artisans are punishable " by law."

(*i*) One moiety of the penalties and forfeitures mentioned in this act is to go to the king, and the other moiety to such officer or officers of the customs as shall sue and prosecute for the same respectively, after deducting the charges of prosecution from the whole.

(*k*) Other persons mentioned in the act, employed in the collieries.

Seducing a servant or apprentice.

It may be here observed, though it does not immediately relate to the subject of this chapter, that the question has been raised, whether to seduce an apprentice or servant away from his master is an indictable offence: and it appears to have been decided that it is not; on the ground that it is not an act of a public nature, but a mere private injury, the proper subject for an action. (*l*)

(*l*) Regin. *v.* Daniel, 6 Mod. 182. S. C. 2 Lord Raym. 1116. Rex *v.* Regin. *v.* Collingwood 6 Mod. 289. Higgins, 2 East. R. 7, 8, 13.

CHAPTER THE THIRTEENTH.

Of administering or taking unlawful oaths.

THE 37 Geo. III. c. 123. s. 1. recites, that wicked and evil disposed persons had attempted to seduce his Majesty's forces and subjects from their duty and allegiance, and to incite them to acts of mutiny and sedition; and had endeavoured to give effect to their wicked and traitorous proceedings, by imposing upon the persons whom they had attempted to seduce the pretended obligation of oaths unlawfully administered. From this preamble it appears as if the statute were mainly directed against combinations for purposes of meeting and sedition; but in the enacting part, after dealing with offences of that description, it goes on in much more extensive terms, and embraces other more general objects. It enacts, "that any person or persons who "shall in any manner or form whatsoever administer, or "cause to be administered, or be aiding or assisting at, or "present at, and consenting to, the administering or taking "of any oath or engagement, purporting or intended to bind "the person taking the same, to engage in any mutinous or "seditious purpose; or to disturb the public peace; or to "be of any association, society, or confederacy, formed for "any such purpose; or to obey the orders or commands of "any committee or body of men not lawfully constituted, "or of any leader or commander, or other person not having "authority by law for that purpose; or not to inform or "give evidence against any associate, confederate, or other "person; or not to reveal or discover any unlawful combi-"nation or confederacy; or not to reveal or discover any

37 Geo. III. c. 123. s. 1. administering unlawful oaths felony, punishable by transportation.

" illegal act done or to be done; or not to reveal or discover " any illegal oath or engagement which may have been ad- " ministered or tendered to, or taken by such person or " persons, or to or by any other person or persons, or the " import of any such oath or engagement;" shall on conviction be adjudged guilty of felony, and be transported for any term not exceeding seven years; " and every person " who shall *take* any such oath or engagement, not being " compelled thereto, shall, on conviction, be adjudged guilty " of felony, and may be transported for any term not ex- " ceeding seven years."

Taking such oaths felony, punishable by transportation.

In a case in the court of King's Bench upon this statute, a question was made, whether the unlawful administering of an oath by an associated body of men to a person, purporting to bind him not to reveal or discover an unlawful combination or conspiracy of persons, nor any illegal act done by them, (*a*) was within this statute; the object of the association being a conspiracy to raise wages and make regulations in a certain trade, and not to stir up mutiny or sedition. It was contended, that the words of the statute, however large in themselves, must be confined to the objects stated in the preamble, and could not have been intended to reach a case where it was plain that the fact arose entirely out of a private dispute between persons engaged in the same trade; and was confined in its object to that alone: and that the general words therefore must be construed with relation to the antecedent offences, which are confined in their objects to mutiny and sedition. But the court, though they did not upon the particular circumstances feel themselves called upon to give an express decision, appear to have entertained no doubt but that the case was within the statute. (*b*)

This statute is not confined to oaths administered for seditious or mutinous purposes.

(*a*) The oath was, " You shall " be true to every journeyman " shearman, and not to hurt any " of them, and you shall not di- " vulge any of their secrets; so " help you God."

(*b*) Rex v. Marks, 3 East. 157. Lawrence, J. said, " It is true, that

52 Geo. III. c. 104. s. 1. Administering unlawful oaths in certain cases felony without clergy.

A recent statute has been passed, to render the foregoing act more effectual in respect to oaths of a particular nature. The 52 Geo. III. c. 104. s. 1. enacts, "that every person "who shall in any manner or form whatsoever administer, "or cause to be administered, or be aiding or assisting at "the administering of any oath or engagement, purporting "or intending to bind the person taking the same to commit "any treason or murder, or any felony punishable by law "with death," shall, on conviction, be adjudged guilty of felony, and suffer death as a felon without benefit of clergy: "and every person who shall *take* any such oath or en- "gagement, not being compelled thereto," shall, on conviction, be adjudged guilty of felony, and be transported for life, or for such term of years as the court shall adjudge.

Taking such oaths felony and transportation for life.

Persons taking oaths by compulsion must disclose the same within a limited time.

But persons taking the oaths mentioned in either of these acts by compulsion, must make a full disclosure of the fact, and the circumstances attending it, within a limited time, in order to be justified or excused. The second section of the 37 Geo. III. c. 123. enacts, "that compulsion shall not "justify or excuse any person taking such oath or engage- "ment, unless he or she shall, within *four days* after the "taking thereof, if not prevented by actual force or sick- "ness, and then within four days after the hindrance pro- "duced by such force or sickness shall cease, declare the "same, together with the whole of what he or she shall "know touching the same, and the person or persons by "whom, and in whose presence, and when and where, such "oath or engagement was administered or taken, by inform- "ation on oath before one of his Majesty's justices of the

"the preamble and the first part "of the enacting clause, are con- "fined in their objects to cases of "mutiny and sedition: but it is "nothing unusual in acts of Par- "liament, for the enacting part "to go beyond the preamble; the "remedy often extends beyond "the particular act or mischief "which first suggested the neces- "sity of the law."

"peace, or one of his Majesty's principal secretaries of "state, or his Majest'ys privy council; or in case the "person taking such oath or engagement shall be in actual "service in his Majesty's forces by sea or land, then by "such information on oath as aforesaid, or by information "to his commanding officer." The statute 52 Geo. III. c. 104. s. 2. contains a similar enactment as to the oaths or engagements within that act, except that the words "*fourteen days*" are substituted for "four days."

What shall be deemed an oath.

By the fifth section of the 37 Geo. III. any engagement or obligation whatsoever in the nature of an oath, and by the sixth section of the 52 Geo. III. any engagement or obligation whatsoever in the nature of an oath purporting or intending to bind the person taking the same to commit any treason or murder or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those acts, in whatever form or manner the same shall be administered or taken; and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons without any administration thereof by any other person or persons.

Persons aiding and assisting are to be deemed principals.

With respect to persons aiding and assisting at the administering or taking these unlawful oaths, the third section of the 37 Geo. III. enacts, that persons aiding and assisting at, or present and consenting to, the administering or taking of any oath or engagement before-mentioned in that act; and persons causing any such oath or engagement to be administered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such; although the person or persons who actually administered such oath or engagement, if any such there shall be, shall not have been tried or convicted. A similar enactment is contained in the fourth section of the 52 Geo. III. with respect to persons aiding and assisting at the administering of any oath or engagement mentioned in

that act; and persons causing any such oath or engagement to be administered, though not present at the administering thereof: such persons are to be deemed principal offenders, and, on conviction, to be adjudged guilty of felony, and to suffer death without benefit of clergy, although the person or persons who actually administered the oath or engagement, if any such there shall be, shall not have been tried or convicted.

In the indictment it is sufficient to set forth the *purport* of the oath or engagement.

Both the statutes provide that it shall not be necessary to set forth in the indictment the words of the oath or engagement; and that it shall be sufficient to set forth the purport of such oath or engagement, or some material part thereof.(c) Upon an indictment on the 37th Geo. III. the fourth count charged, that the defendants administered to J. H. an oath "intended to bind him not to inform or give "evidence against any member of a certain society formed "to disturb the public peace for any act or expression of "his or their's, done or made collectively or individually in "or out of that or other similar societies, in pursuance of "the spirit of that obligation;" and the eighth count stated the oath to be "intended to bind the said J. H. not to give "evidence against any associate in certain associations and "societies of persons formed for seditious purposes:" and the other counts stated the objects of the oath administered, and the objects of the society, differently and more generally, adapted to several prohibitory parts of the statute. Upon objection taken at the trial to the generality of the statements in the indictment, Lord Alvanley was of opinion, that the act intended that it should be sufficient to allege and prove what the object of the oath and engagement was, without stating any words at all; and that the offence being described in the words of the act, was well described: but that supposing the objection made to the generality of the counts was good, which he did not admit, yet that in the

(c) 37 Geo. III. c. 123. s. 4. 52 Geo. III. c. 104. s. 5.

fourth and eighth a material part of the oath or engagement was set forth according to the clause of the act. The point was submitted to the judges, who, without giving any opinion against the other counts, all agreed that at any rate the fourth and eighth counts were good. (*d*)

Evidence.—It is not necessary to produce a paper from which it is *supposed* that the oath was read.

And parole evidence may be given to explain the nature of the oath.

Where the witness, swearing to the words spoken by way of oath by the prisoner when he administered it, said that he held a paper in his hand at the time when he administered the oath, from which paper it was *supposed* that he read the words; it was held, that parole evidence of what he in fact said was sufficient, without giving him notice to produce such paper. (*e*) And where the oath on the face of it did not purport to be for a seditious purpose, though it was objected that no parole evidence could be given to shew that the "*brotherhood*" mentioned in it was of a seditious nature, it was held that declarations made at the time by the party administering such an oath were admissible to prove the real object of it. (*f*)

Place of trial.

Both the statutes, 37 Geo. III. and 52 Geo. III. provide, that offences committed on the high seas, or out of the realm, or in *England*, shall be tried before any court of oyer and terminer or gaol delivery for any county in England in such manner and form as if such offence had been therein committed; and that offences committed in *Scotland* shall be tried either before the justiciary court at Edinburgh, or in any of the circuit courts in that part of the united kingdom. (*g*)

Persons tried not liable to be tried for

It is also provided by both these statutes that any person who shall be tried and acquitted or convicted of any offence

(*d*) Rex *v.* Moors and others, 6 East. 419. note (*b*). The defendants were tried at *Lancaster* summer assizes, 1801, and the opinion of the judges was given in Michaelmas term, 1801.

(*e*) Rex *v.* Moors and others, 6 East. 421.

(*f*) *Id. Ibid.*

(*g*) 37 Geo. III. c. 123. s. 6. 52 Geo. III. c. 104. s. 7.

the same fact as high treason.

But persons offending against these acts may be tried for high treason, if not tried under the acts.

against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason. And further, that nothing in the acts contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same as an offence against the acts, from being tried for the same as high treason, or misprision of high treason, in such manner as if those acts had not been made. (*h*)

57 Geo. III. c. 19. s. 25. Societies taking unlawful oaths, &c. to be deemed unlawful combinations and confederacies.

By a statute, very recently passed, the 57th Geo. III. c. 19. s. 25, it is enacted, that all societies or clubs, the members whereof shall be required or admitted to take any oath or engagement, which shall be an unlawful engagement within the 37th Geo. III. c. 123. or the 52d Geo. III. c. 104. or to take any oath not required or authorized by law; and every society or club, the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement on becoming, or in order to become, or in consequence of being a member or members of such society or club; and every society or club, the members or any member whereof shall be required or admitted to take, subscribe, or assent to any test or declaration not required or authorized by law, in whatever manner or form such taking or assenting shall be performed, whether by words, signs, or otherwise, either on becoming, or in order to become, or in consequence of being a member or members of any such society or club; shall be deemed and taken to be *unlawful combinations and confederacies* within the meaning of the 39th Geo. III. c. 79. and may be prosecuted, proceeded against, and punished, according to the provisions of the said act. (*i*)

(*h*) 37 Geo. III. c. 123. s. 7. 52 Geo. III. c. 104. s. 8.

(*i*) This statute is not to extend to freemasons' lodges, nor to any declaration approved by two justices, nor to *Quakers*' meetings, nor to meetings or societies for charitable purposes. S. 26. By s. 39. the act is not to extend to Ireland: and s. 40. provides for its being repealed or altered during the present session.

With respect to the administering or taking unlawful oaths in *Ireland*, a late statute, 50 Geo. III. c. 102. has enacted, "that any person or persons who shall administer, "or cause to be administered, tender, or cause to be tendered, or be present aiding and assisting at the administering or tendering, or who shall by threats, promises, persuasions, or other undue means, cause, procure, or induce, to be taken by any person or persons in *Ireland*, upon a book or otherwise, any oath or engagement importing to bind the person or persons taking the same to be of any association, brotherhood, committee, society, or confederacy whatsoever, in reality formed, or to be formed, for seditious purposes, or to disturb the public peace, or to injure the persons or property of any person or persons whatsoever, or to compel any person or persons whatsoever, to do, or omit, or refuse to do, any act or acts whatsoever, under whatever name, description, or pretence, such association, brotherhood, committee, society, or confederacy, shall assume, or pretend to be formed or constituted, or any oath or engagement importing to bind the person taking the same to obey the orders, or rules, or commands, of any committee or other body of men not lawfully constituted, or of any captain, leader or commander, (not appointed by or under the authority of his Majesty, his heirs and successors,) or to assemble at the desire and command of any such captain, leader, commander, or committee, or of any person or persons not having lawful authority, or not to inform or give evidence against any brother, associate, confederate, or other person, or not to reveal or discover his or her having taken any illegal oath, or not to reveal or discover any illegal act done or to be done, or not to discover any illegal oath or engagement which may be administered or tendered to him or her, or the import thereof, whether such oath shall be afterwards so administered or tendered, or not, or whether he or she shall take such oath, or enter into such engagement or not, being by due course of law convicted thereof, shall

Administering unlawful oaths in *Ireland* felony and transportation for life.

" be adjudged guilty of felony, and be transported for life;
" and every person who shall *take*, in *Ireland*, any such
" oath or engagement, importing so to bind him or her as
" aforesaid, and being by due course of law thereof con-
" victed, shall be adjudged guilty of felony, and be
" transported for seven years."

And taking such oath in *Ireland*, transportation for seven years.

Persons compelled by necessity are excused if they disclose what they know in a limited time.

This statute further enacts, that a person compelled by inevitable necessity to commit any of these offences, shall be excused and justified upon proof of such necessity, if within ten days (not being prevented by actual force or sickness, and then within seven days after such actual force or sickness shall cease to disable him,) he disclose to a justice of peace, by information on oath, the whole of what he knows touching his compulsion. (*k*) Persons aiding at the administering or tendering the oath or engagement, and persons causing the oath or engagement to be administered or tendered, though not present, are to be deemed principal offenders, and tried as such, though the person who actually administered such oath or engagement shall not have been tried or convicted. (*l*) And the statute also provides, that it shall be sufficient to set forth in the indictment the purport or object of such oath or engagement.(*m*)

Aiders to be deemed principal offenders.

Purport of the oath sufficient in the indictment.

(*k*) S. 2. And the section provides also, that no person shall be excluded from the defence of inevitable necessity, who shall be tried for an offence within ten days from the commission of it, or of seven days from the time when the force or sickness shall cease.

(*l*) S. 3.

(*m*) S. 4.

CHAPTER THE FOURTEENTH.

Of Misprision of Felony, and of compounding Offences.

Of misprision or concealment of felony.

BY misprision of felony, is generally understood the *concealment of felony*, or a *procuring* such concealment, whether it be felony by the common law or by statute. (*a*) Thus, silently to observe the commission of a felony without using any endeavour to apprehend the offender, is a misprision; (*b*) for a man is bound to discover the crime of another to a magistrate with all possible expedition. (*c*) But there must be knowledge merely without any assent; for if a man assent to a felony, he will be either principal or accessory. (*d*) The punishment of this offence in an officer is imposed by the statute of *Westminster*, 3 Edw. I. c. 9. which enacts, that "if the sheriff, coroner, or any other "bailiff within a franchise, or without, for reward, or for "prayer, or for fear, or for any manner of affinity, conceal, "consent, or procure to conceal, the felonies done in their "liberties; or otherwise will not attach nor arrest such "felons (there as they may), or otherwise will not do their "office, for favour borne to such misdoers, and be attainted "thereof, they shall have one year's imprisonment, and after "make a grievous fine at the king's pleasure, if they have "wherewith; and if they have not whereof, they shall have "imprisonment of three years." The punishment in the case of a common person, is imprisonment for a less discretionary time; and in both cases fine and ransom at the

(*a*) 1 Hawk. P. C. c. 59. s. 2. 3 Inst. 139.

(*b*) 1 Hale 374, 375. 1 Hawk. P. C. c. 59. s. 2. note (1).

(*c*) 3 Inst. 140.

(*d*) 4 Blac. Com. 121.

king's pleasure. (*e*) By the 3 Hen. VII. c. 1. the justices of every shire may take an inquest to inquire of the concealments of other inquests, of such matters and offences as are to be inquired and presented before justices of the peace, whereof complaint shall be made by bill; and if such concealment be found of any inquest within a year after the concealment, every person of the inquest is to be amerced for the concealment by discretion of the justices.

Of compounding of felony or theft-bote.

Of a similar nature to this offence of misprision of felony, is the offence of *compounding of felony*, mentioned in the books by the more ancient appellation of *theft-bote*, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends, upon agreement not to prosecute. (*f*) It is said to have been anciently punishable as felony; but is now punished only with fine and imprisonment, unless it be accompanied with some degree of maintenance given to the felon, which makes the party an accessory after the fact. (*g*) But the barely taking again one's own goods which have been stolen, is no offence at all unless some favour be shewn to the thief. (*h*)

It may be observed, that to take any reward for helping a person to stolen goods is made felony by 4 Geo. I. c. 11.; and to advertise a reward for the return of things stolen, incurs a forfeiture of fifty pounds by 25 Geo. II. c. 36.

Compounding misdemeanors.

An agreement to put an end to a *misdemeanor* has been considered to be illegal, as impeding the course of public

(*e*) 4 Blac. Com. 121. where it is said, "which pleasure of the king "must be observed, once for all, "not to signify any extrajudicial "will of the sovereign, but such "as is declared by his representa- "tives, the judges in his courts of "justice, *voluntas regis in curiâ* "*non in camerâ*."

(*f*) 1 Hawk. P. C. c. 59. s. 5. 4 Blac. Com. 133.

(*g*) 1 Hawk. P. C. c. 59. s. 6. 2 Hale 400.

(*h*) 1 Hawk. P. C. c. 59. s. 7.

justice; (*i*) but it is sometimes done after conviction with the sanction of the court, in cases where the offence principally and more immediately affects an individual, the defendant being permitted *to speak with the prosecutor* before any judgment is pronounced, and a trivial punishment being inflicted if the prosecutor declares himself satisfied. (*k*) And where, in a case of an indictment for ill treating a parish apprentice, a security for the fair expences of the prosecution had been given by the defendant after conviction, upon an understanding that the court would abate the period of his imprisonment, the security was held to be good, upon the ground that it was given with the sanction of the court, and to be considered as part of the punishment suffered by the defendant in expiation of his offence, in addition to the imprisonment inflicted on him. (*l*)

Of compounding informations on penal statutes.

The compounding of *informations on penal statutes* is a misdemeanor against public justice, by contributing to make the laws odious to the people. (*m*) Therefore, in order to discourage malicious informers, and to provide that offences when once discovered shall be duly prosecuted, it was enacted by the statute 18 Eliz. c. 5. s. 4. that if any informer, by colour or pretence of process, or without process upon colour or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court, he shall stand two hours in the pillory, (*n*)

(*i*) Collins *v.* Blantern, 2 Wils. 341-9. Edgcombe *v.* Rodd and others, 5 East. 298. 302.

(*k*) 4 Blac. Com. 363, 364.

(*l*) Beeley *v.* Wingfield, 11 East. 46. But in general any contract or security made in consideration of dropping a criminal prosecution, suppressing evidence, soliciting a pardon, or compounding any public offence, without leave of the court, is invalid. 1 Chit. Crim. Law, 4.

(*m*) 4 Blac. Com. 136.

(*n*) This part of the punishment cannot now, by 56 Geo. III. c. 138. be inflicted. But section 2. of that statute empowers the court to pass such sentence of fine or imprisonment, or of both, in lieu of the sentence of pillory, as to the court shall seem proper.

be for ever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This severe statute extends even to penal actions, where the whole penalty is given to the prosecutor. (*o*)

In a case where it was held that threatening by letter or otherwise, to put in motion a prosecution by a public officer to recover penalties for selling *Fryer's Balsam* without a stamp, (*p*) for the purpose of obtaining money to stay the prosecution, (not being such a threat as a firm and prudent man might not be expected to resist,) was not in itself an indictable offence at common law, though it was alleged that money was obtained, it seems to have been considered that such an offence would be indictable under the foregoing section of this statute of Elizabeth. (*q*) But no indictment for any *attempt* to commit such a statutable misdemeanor, can be sustained as a misdemeanor at common law, without at least bringing the offence intended within, and laying it to be against the statute. Though if the party so threatened had been alleged to be guilty of the offence imputed within the statute imposing the duty and creating the penalty, such an attempt to compound and stifle a public prosecution for the sake of private lucre, in fraud of the revenue, and against the policy of the statute (which gives the penalty as auxiliary to the revenue, and in furtherance of public justice for the sake of example,) might also, upon general principles, have been deemed a sufficient ground on which to have sustained the indictment at common law. (*r*)

(*o*) 4 Blac. Com. 136. note (3).

(*p*) By the 42 Geo. III. c. 56. it was prohibited to be vended without a stamped label.

(*q*) Rex *v.* Southerton, 6 East. 126.

(*r*) *Id. Ibid.*

CHAPTER THE FIFTEENTH.

Of Offences by Persons in Office.

Officers indictable for misconduct.

WHERE an officer neglects a duty incumbent on him, either by common law or by statute, he is indictable for his offence; and this, whether he be an officer of the common law, or appointed by act of Parliament: (*a*) and a person holding a public office under the king's letters patent, or derivatively from such authority, has been considered as amenable to the law for every part of his conduct, and obnoxious to punishment for not faithfully discharging it. (*b*) And it is laid down generally, that any public officer is indictable for misbehaviour in his office. (*c*) There is also the further punishment of the forfeiture of the office for the misdemeanor of doing any thing directly contrary to its design. (*d*) And in the case of a coroner, the statute 25 Geo. II. c. 29. s. 6. makes particular provision, and enacts, that when convicted of extortion, or wilful neglect of duty, or misdemeanor in office, he may be removed from office by the judgment of the court in which he is convicted, unless such office be annual, or annexed to some other office.

It is proposed to treat shortly, in the present chapter, of oppression, negligence, fraud, and extortion, by persons in office; and of the refusal of persons to execute the duties of their offices when properly appointed; leaving the subjects of buying and selling offices, and of bribery, for subsequent chapters.

(*a*) Regin. *v.* Wyat, 1 Salk. 380. Anon. 6 Mod. 96.

(*b*) Rex *v.* Bembridge, M. 24th Geo. III. 1 Salk. 380. note (*a*).

(*c*) Anon. 6 Mod. 96.

(*d*) 1 Hawk. P. C. c. 66. s. 1.

Oppression by public officers.

The *oppression* and tyrannical partiality of judges, justices, and other magistrates in the administration, and under colour of their offices, may be punished by impeachment in parliament, or by information or indictment, according to the rank of the offenders, and the circumstances of the offence. (*e*) Thus if a justice of peace abuses the authority reposed in him by law, in order to gratify his malice, or promote his private interests or ambition, he may be punished by indictment or information. But the court of King's Bench have expressly declared, that though a justice of peace should act illegally, yet if he has acted honestly and candidly, without oppression, malice, revenge, or any bad view or ill intention whatsoever, the court will never punish him by the extraordinary course of an information, but will leave the party complaining to the ordinary method of prosecution by action or indictment. (*f*) And where a justice has committed an involuntary error without any corrupt motive or intention, it has been questioned whether it is an indictable offence; on the ground that the act in that case is either null and void, or the justice is answerable in damages for all its consequences. (*g*) But in a case where two sets of magistrates, having a concurrent jurisdiction, one set of them appointed a meeting to grant ale licences, and, after such appointment, the other set of magistrates appointed a meeting for the same purpose on a subsequent day, and, having met, granted a licence which had been refused by the first set, it was held that the proceedings of the magistrates appointing the second meeting were illegal, and the subject of an indictment. Lord Kenyon, C. J., said

(*e*) 4 Blac. Com. 141. A judge is not indictable for an error in judgment; but this rule extends only to judges in courts of record, and not to ministerial officers. Rex v. Loggen and another, 1 Str. 74.

(*f*) Rex v. Palmer and others, 2 Burr. 1162. 1 Blac. Com. 354. note (17), where it is said that in no case will the court grant an information unless an application for it be made within the second term after the offence committed, and notice of the application be previously given to the justice, and unless the party injured will undertake to bring no action.

(*g*) 1 Blac. Com. 354. note (17).

that it was proper the question should be settled whether it were *legal* for two different sets of magistrates, having a concurrent jurisdiction, to run a race in the exercise of any part of their jurisdiction; and that it was of infinite importance to the public that the acts of magistrates should not only be substantially good, but also that they should be decorous. And Ashurst, J. said that it was a breach of the law to attempt to wrest the jurisdiction out of the hands of the magistrates who first gave notice of the meeting; for what the law says shall not be done, it becomes illegal to do, and is therefore the subject matter of an indictment, without the addition of any corrupt motives. And that though the want of corruption might be an answer to an application for an information which is made to the extraordinary jurisdiction of the court, yet it is no answer to an indictment where the judges are bound by the strict rule of law. (*h*)

Of justices granting or refusing ale licences improperly.

The conduct of justices of the peace in granting or refusing licences to sell ale, has been frequently the subject of investigation; and it seems to be clear that though upon this matter the justices have a discretionary jurisdiction given them by the law, and though discretion means the exercising the best of their judgment upon the occasion that calls for it, yet if this discretion be wilfully abused, it is criminal, and under the controul of the court of King's Bench. (*i*) That court will therefore grant an information against justices who refuse from corrupt and improper motives to grant such licences; (*k*) and an information will be granted against them as well for granting a licence improperly as for refusing one in the same manner. (*l*)

(*h*) Rex *v.* Sainsbury and another, 4 T. R. 451.

(*i*) Rex *v.* Young and Pitts, 1 Burr. 556, 560, *et sequ.*

(*k*) Rex *v.* Williams and Davis, 3 Burr. 1317. The licences in this case had been refused, because the persons applying for them would not give their votes for members of parliament as the justices would have had them. And see Rex *v.* Hann and Price, *id.* 1716. 1786.

(*l*) Rex *v.* Holland and Forster, 1 T. R. 692. And see 1 Burn's Just. tit. *Alehouses*, Sect. II.

Of gaolers forcing persons to give evidence.

To prevent abuses by the extensive power which the law is obliged to repose in gaolers, it is enacted by the statute 14 Edw. III. c. 10. that if any gaoler, by too great duress of imprisonment, makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will; that is, to accuse and turn evidence against some other person; it shall be felony in the gaoler. For it is not lawful to induce or excite any man even to a just accusation of another; much less to do it by duress of imprisonment; and least of all by a gaoler, to whom the prisoner is committed for safe custody. (*m*) And a gaoler may be discharged and fined for voluntarily suffering his prisoners to escape, or for barbarously misusing them. (*n*)

Overseers of the poor are punishable for misfeasance in their offices.

An *overseer* of the poor is also indictable for misfeasance in the execution of his office: as if he relieve the poor where there is no necessity for it; (*o*) or if he misuse the poor, as by keeping and lodging several poor persons in a filthy unwholesome room, with the windows not in a sufficient state of repair to protect them against the severity of the weather; (*p*) or by exacting labour from them when they are unable to work. (*q*) And if overseers conspire to prevail upon a man to marry a poor woman big with child, for the purpose of throwing the expence of maintaining her and the issue from themselves upon another parish or township, they may be indicted. (*r*) And for most breaches of their duty overseers may be punished by indictment or information; (*s*) but with respect to the proceeding by inform-

(*m*) 4 Blac. Com. 128. 3 Inst. 91.

(*n*) 1 Hawk. P. C. c. 66. s. 2.

(*o*) Tawney's case, 16 Vin. Abr. 415. 1 Bott. 333. Pl. 402.

(*p*) Rex *v.* Wetheril and another, Cald. 432.

(*q*) Rex *v.* Winship and another, Cald. 76.

(*r*) Rex *v.* Compton, Cald. 216. Rex *v.* Tarrant, and Rex *v.* Herbert, 1 East. P. C. c. 11. s. 11. p. 461.

(*s*) Rex *v.* Commings, 1 Bott. 332. Pl. 372. Rex *v.* Robinson, 2 Burr. 799. Rex *v.* Jones, 1 Bott. 337. Pl. 379. From these authorities it appears that such proceeding may be had in some cases where a particular punishment is

ation, as it is an extraordinary remedy, the court of King's Bench will not suffer it to be applied to the punishment of ordinary offences, and has long come to a resolution not to grant informations against overseers for procuring a pauper's marriage with a view to burthen another parish. (*t*)

Negligence by public officers.

It has been already stated, that an officer *neglecting* the duties of his office is guilty of an indictable offence. (*u*) In some cases also the offence will amount to a forfeiture of his office, if it be a beneficial one; (*w*) for by the implied condition that the grantee of an office shall execute it diligently and faithfully it appears to be clear that he will be liable to a forfeiture of it, not only for doing a thing directly contrary to its design, but also for neglecting to attend his duty at all usual, proper, and convenient, times and places, whereby any damage shall accrue to those by or for whom he was made an officer. (*x*) A coroner neglecting the duties of his office is indictable: (*y*) and by statute 3 Edw. I. c. 9. the sheriff, coroner, or any other bailiff concealing felonies, or not arresting felons, or otherwise not doing their duty, are to be imprisoned for a year, and fined at the king's pleasure. (*z*) And an indictment lies at common law against

created by statute, and a specific method of recovering the penalty is pointed out. But as to this see *ante*, Book I. Chap. III. p. 65, 66.

(*t*) Rex *v.* Slaughter, Cald. 246. note (*a*). And perhaps this offence would not be punishable at all if the woman settled in the defendant's parish previous to the marriage is with child by the man to whom the defendants procure her to be married. 2 Nolan 232.

(*u*) *Ante*, p. 213.

(*w*) 4 Blac. Com. 140.

(*x*) 1 Hawk. P. C. c. 66. s. 1. And see further as to forfeiture of offices, Com. Dig. *Officer*, (K. 2.) (K. 3.) and the Earl of Shrewsbury's case, 9 Co. 50.

(*y*) See precedents of indictments against coroners for refusing to take inquisitions, or for not returning inquisitions according to evidence, 2 Chit. Crim. Law, 255. Cro. Circ. Comp. (8th ed.) 170. (7th ed.) 303, 304.

(*z*) *Ante*, p. 209, 210. And by 3 Hen. VII. c. 1. if any coroner be remiss and make not inquisition upon the view of the body dead, and certify not, as ordained in the statute, he shall, for every default, forfeit to the king a hundred shillings.

all subordinate officers for neglect, as well as misconduct, in the discharge of their official duties. A constable is therefore indictable for neglecting the duties required of him by common law or by statute; (*a*) and when a statute requires him to do what without requiring had been his duty, it is not imposing a new duty, and he is indictable at common law for the neglect. (*b*) And an overseer of the poor is indictable for the wilful neglect of his duty. Thus overseers have been held to be indictable for not providing for the poor; (*c*) for refusing to account within four days after the appointment of new overseers, under 43 Eliz. c. 2.; (*d*) for not making a rate to reimburse constables under 14 Car. II. c. 14.; (*e*) and for not receiving a pauper sent to them by order of two justices; (*f*) or disobeying any other order of justices, where the justices have competent jurisdiction. (*g*)

Justices at petty sessions may fine constables, &c. for neglect of duty.

By the 33d Geo. III. c. 55. two justices, at a petty or special sessions of the peace, upon complaint on oath of any neglect of duty or disobedience of any warrant or order of any justice of the peace, by any constable, overseer of the poor, or other peace or parish officer, such constable, overseer, or other officer, having been duly summoned, may impose, upon conviction, any reasonable fine or fines not

(*a*) Regin. *v.* Wyat, 1 Salk. 380. Crowther's case, Cro. Eliz. 654; Indictment against a constable for refusing to make hue and cry after notice of a burglary.

(*b*) Regin. *v.* Wyat, 1 Salk. 381.

(*c*) 2 Nolan 231 Tawney's case, 1 Bott 333. Rex *v.* Winship and another, Cald. 72.

(*d*) Rex *v.* Commings, 5 Mod. 179. 2 Nol. 232, where it is observed in the note (2) that this case occurred prior to 17 Geo. II. c. 38.

(*e*) Rex *v.* Barlow, 2 Salk. 609. 1 Bott. 332. The objection was, that the word used in the act is "may," which does not require it as a duty. But the court held the word "may" to be imperative, and the same as "shall." By 18 Geo. III. c. 19. constables are now to be paid for parish business out of the poor's rate.

(*f*) Rex *v.* Davis and another, 1 Bott 338. Pl. 409. Say. 163. S. C.

(*g*) 2 Nol. 373. Rex *v.* Boys, Say. 143. But otherwise where the justices have no jurisdiction, Rex *v.* Smith, 1 Bott 403. Pl. 526.

exceeding the sum of forty shillings, as a punishment for such neglect of duty or disobedience.

Chief officers of corporations absenting themselves from, or hindering the elections of other officers, may be imprisoned.

The absence or misconduct of the chief officers of corporations at the time of elections, whereby the completion of the election of other chief officers may be prevented, is punishable by the provisions of 11 Geo. I. c. 4. The sixth section of the statute enacts, "that if any mayor, bailiff "or bailiffs, or other chief officer or officers of any city, "borough, or town corporate, shall voluntarily absent him- "self or themselves from, or knowingly and designedly "prevent or hinder the election of any other mayor, bailiff, "or other chief officer in the same city, borough, or town "corporate, upon the day, or within the time appointed by "charter or ancient usage for such election;" such offender being convicted shall, for every offence, be imprisoned for six months, and be for ever disabled from exercising any office belonging to the same city, borough, or corporation. This voluntary absence from the election of a chief officer must be such an absence whereby the mischief complained of in the preamble of the statute, namely, the preventing the completion of the election of a chief officer, may possibly be occasioned. It has been decided, therefore, that a chief officer voluntarily absenting himself upon the charter day of election of his successor is not indictable, unless his presence as such chief officer be *necessary* by the constitution of the corporation to constitute a legal corporate assembly for such purpose. (*h*)

Frauds by public officers.

Public officers may also be indicted for frauds committed in their official capacities. Thus in a case where two persons were indicted for enabling others to pass their accounts with the pay office in such a way as to enable them to defraud the government, though it was objected that it was only a private matter of account and not indictable, the court held otherwise, as it related to the public reve-

(*h*) Rex *v.* Corry, 5 East. 372.

nue.(*i*) And if an overseer of the poor receive from the putative father of a bastard child born within the parish a sum of money as a composition with the parish for the maintenance of the child, he is liable to an indictment for fraudulently omitting to give credit for this sum in his accounts with the parish.(*k*) It was objected in this case, that the defendant was not bound to bring this sum to account, the contract being illegal,(*l*) that the whole might have been recovered back, and that the defendant himself would have been personally answerable for it to the putative father; that the money, therefore, was not the money of the parish, and that the parish was neither defrauded nor damnified by its being omitted in the overseer's accounts. But Lord Ellenborough was of opinion, that though the defendant would have been liable to the putative father for so much of the money as was not expended upon the maintenance of the child and the lying-in of the mother, yet having taken the money as overseer for the benefit of the parish, he was bound to bring it to account, and that he was guilty of an indictable offence by attempting to put it into his own pocket.

By officers, &c. of the general penitentiary at Millbank.

By the 56th Geo. III. c. 63. which was passed to regulate the general penitentiary for convicts at *Millbank*, provision is made for the punishment of the governor and the other officers and servants of that establishment, in case of any fraudulent or improper charges in their accounts. The twelfth section enacts, (after stating the mode of examination to be adopted,) that in case there shall appear in any such accounts any false entry knowingly or wilfully made, or any fraudulent omission, or any other fraud whatsoever, or any collusion between the officers and servants, or between the officers and servants and any other persons in any matter relative thereto, the committee may dismiss such officers or servants, and, if they see fit, cause indictments to

(*i*) Rex *v.* Bembridge and another, cited 6 East. 136.

(*k*) Rex *v.* Martin, 2 Campb. 268.

(*l*) See Townson *v.* Wilson, 1 Campb. 396.

be preferred against the officers, servants, or other persons so offending at the next quarter or other general session of the peace for the county wherein the penitentiary is situated, or for any adjoining county; and in case the persons indicted are found guilty, they are to be punished by fine and imprisonment, or either of them, at the discretion of the court.

It may be observed, that where a duty is thrown on a body consisting of several persons, each is individually liable for a breach of duty, as well for acts of commission as for omission; and where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his office, it is not necessary to state that he had notice of those acts; for he is presumed from his situation to know them. (*m*)

Extortion by public officers.

Extortion in a large sense signifies any oppression under colour of right; but in a more strict sense signifies the unlawful taking by any officer, by colour of his office, of any money or thing of value that is not due to him, or more than is due, or before it is due. (*n*) By the statute of *Westm.* 1. (3 Edw. I.) c. 26. which is only in affirmance of the common law, it is declared and enacted to be extortion for any sheriff or other minister of the king, whose office any way concerns the administration or execution of justice, or the common good of the subject, to take any reward whatsoever, except what he received from the king. This statute extends to escheators, coroners, bailiffs, gaolers, and other inferior officers of the king, whose offices were instituted before the making of the act. (*o*) Justices of the peace, whose office was instituted after the act, are bound by their oath of office to take nothing for their office of justice of the peace to be done, but of the king, and fees

(*m*) Rex *v.* Holland, 5 T. R. 607.

(*n*) 4 Blac. Com. 141. 1 Hawk. P. C. c. 68. s. 1.

(*o*) 2 Inst. 209. 2 Burn. Just. *tit.* Extortion, p. 341.

accustomed, and costs limited by statute. And generally no public officer may take any other fees or rewards for doing any thing relating to his office than some statute in force gives him, or else as have been anciently and accustomably taken; and if he do otherwise he is guilty of extortion. (*p*) And it should be observed, that all prescriptions which have been contrary to the statute and to the common law, in affirmance of which it was made, have been always holden to be void; as where the clerk of the market claimed certain fees as due time out of mind, for the examination of weights and measures; and this was adjudged to be void. (*q*)

The stated fees of courts of justice may be insisted upon.

But the stated and known fees allowed by the courts of justice to their respective officers, for their labour and trouble, are not restrained by the common law, or by the statute of *Westm.* 1. c. 26. and therefore such fees may be legally demanded and insisted upon without any danger of extortion. (*r*) And it seems that an officer who takes a reward, which is voluntarily given to him, and which has been usual in certain cases, for the more diligent or expeditious performance of his duty, cannot be said to be guilty of extortion; for without such a *premium* it would be impossible in many cases to have the laws executed with vigour and success. (*s*) But it has been always holden, that a promise to pay an officer money for the doing of a thing which the law will not suffer him to take any thing for, is merely void, however freely and voluntarily it may appear to have been made. (*t*)

Cases of extortion.

It has been held to be extortion to oblige the executor of a will to prove it in the bishops' court, and to take fees

(*p*) Dalt. c. 41. 2 Burn's Just. *tit.* Extortion, p. 341.

(*q*) 1 Hawk. P. C. c. 68. s. 2. 3 Bac. Abr. 108. *tit.* Extortion.

(*r*) 1 Hawk. P. C. c. 68. s. 3. 2 Inst. 210. Co. Lit. 368. 3 Bac. Abr. 108. *tit.* Extortion.

(*s*) 3 Bac. Abr. 108. *tit.* Extortion. 2 Inst. 210. 3 Inst. 149. Co. Lit. 368.

(*t*) 3 Bac. Abr. 108. *tit.* Extortion.

thereon, when the defendants knew that it had been proved before in the prerogative court. (*u*) And it is extortion in a *churchwarden* to obtain a silver cup or other valuable thing, by colour of his office. (*w*) And a *coroner* is guilty of this offence, who refuses to take the view of a dead body until his fees are paid. (*x*) So if an *undersheriff* obtain his fees by refusing to execute process till they are paid, (*y*) or take a bond for his fee before execution is sued out, (*z*) it will be extortion. And it will be the same offence in a *sheriff's officer* to bargain for money to be paid him by A. to accept A. and B. as bail for C., whom he has arrested : (*a*) or to arrest a man in order to obtain a release from him : (*b*) and also in a gaoler to obtain money from his prisoner by colour of his office. (*c*) In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion : (*d*) and the same if a ferry-man take more than is due by custom for the use of his ferry. (*e*) And it was held that if the farmer of a market erects so many stalls, as not to leave sufficient room for the market people to stand and sell their wares, so that for want of room they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such case is extortion. (*f*)

In a recent case it was decided, that the question of ex-

(*u*) Rex *v.* Loggen and another, 1 Str. 73.

(*w*) Roy *v.* Eyres, 1 Sid. 307.

(*x*) 3 Inst. 149.

(*y*) Hescott's case, 1 Salk. 330. The court said that the plaintiff might bring an action against him for not doing his duty, or might pay him his fees, and then indict him for extortion.

(*z*) Empson *v.* Bathurst, Hutt. 53, where it is said that an obligation made by extortion is against common law, for it is as robbery : and that the sheriff's fee is not due until execution.

(*a*) Stotesbury *v.* Smith, 2 Burr. 924.

(*b*) Williams *v.* Lyons, 8 Mod. 189.

(*c*) Rex *v.* Broughton, Trem. P. C. 111. Stark. 588.

(*d*) Rex *v.* Burdett, 1 Lord Raym. 149.

(*e*) Rex *v.* Roberts, 4 Mod. 101.

(*f*) Rex *v.* Burdett, 1 Lord Raym. 149.

emption from toll could not be tried on an indictment against a turnpike-keeper for extortion in taking the toll, the general right to demand toll not having been denied, nor the ground of exemption notified, at the time when the toll was taken. (*g*)

The 33 Geo. III. c. 52. s. 62. enacts that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under colour thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the *East India* company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his Majesty, or the company in the *East Indies*, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value; but the court may order such present to be restored to the party who gave it, or may order it, or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

Two persons may be indicted jointly for extortion, and there are no accessories.

Two persons may be indicted jointly for extortion where no fee was due; and there are no accessories in this offence. In a case where the indictment was against the chancellor, and also against the register of a bishop, it was objected that the offices of the defendants were distinct, that what might be extortion in one might not be so in the other, and that therefore the indictment ought not to be joint. But by Parker C. J. this would be an exception if they were indicted for taking more than they ought; but it is only against them for contriving to get money where none is due: and this is an entire charge. For there are no accessories in extortion; but he that is assisting is as guilty as the extortioner, as he that is party to a riot is answerable for the act of others. (*h*)

(*g*) Rex *v.* Hamlyn, 4 Camph. 179.

(*h*) Rex *v.* Loggen and another, 1 Str. 75. *Qu.* Whether this was

Trial.

It is said, that an indictment for extortion may be laid in any county by the 31 Eliz. c. 5. s. 4.; (*i*) but this position has been questioned. (*k*) It may be tried and determined by justices of the peace at their sessions by virtue of the term "extortions" in their commission. (*l*) The indictment must state a sum which the defendant received; but it is not material to prove the exact sum as laid in the indictment; so that if a man be indicted for taking extorsively twenty shillings, and there be proof but of one shilling, it will be sufficient. (*m*) And the extorsive agreement is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion. (*n*)

Not material to prove the exact sum laid.

Punishment.

The offence of extortion is punishable at common law by fine and imprisonment; and also by a removal from the office in the execution of which it was committed; (*o*) and there is a further additional punishment by the statute of *Westm.* 1. c. 26. by which it is enacted "that no sheriff "nor other king's officer shall take any reward to do his "office, but shall be paid of that which they take of the "king; and that he who so doth shall yield twice as much, "and shall be punished at the king's pleasure." (*p*) And an action lies to recover this double value. (*q*)

not an indictment for a conspiracy to defraud, and not for extortion. But as to the rule that several persons may be jointly indicted for extortion, see Rex *v.* Atkinson and another, Lord Raym. 1248. 1 Salk. 382.

(*i*) 1 Hawk. P. C. c. 68. s. 6. note (3); 2 Burn's Just. 344, *Extortion.* Stark. Crim. Plead. 585, note (k).

(*k*) 2 Hawk. P. C. c. 26. s. 50. 2 Chit. Crim. Law. 294, in the note.

(*l*) Rex *v.* Loggen and another, 1 Stra. 73.

(*m*) Rex *v.* Burdett, 1 Lord Raym. 149; and see Rex *v.* Gillham, 6 T. R. 267.

(*n*) By Holt, C. J. in Rex *v.* Burdett. 1 Lord Raym. 149.

(*o*) 1 Hawk. P. C. c. 68. s. 5. 3 Bac. Abr. 109. *Extortion.*

(*p*) By the "king's pleasure" is meant by the king's justices before whom the cause depends, and at their discretion. 2 Inst. 210.

(*q*) 3 Com. Dig. 323.

Refusal to execute offices.

The refusal of persons to execute ministerial offices to which they are duly appointed, and from the execution of which they have no proper ground of exemption, seems in general to be an indictable offence. Thus it has been held to be indictable for a constable, after he has been duly chosen, to refuse to execute the office, (*r*) or to refuse to take the oath for that purpose. (*s*) So a person is indictable for refusing to take upon himself the office of overseer of the poor. (*t*) For though the statute 43 Eliz. c. 2. says only that certain persons therein described shall be overseers, and gives no express indictment for a refusal of office; yet upon the principles of common law, which are that every man shall be indicted for disobeying a statute, the refusal to serve when duly appointed is indictable. (*u*) But there should be previous notice of the appointment; and the indictment should shew that the defendant was bound to undertake the office by setting forth how he was elected. (*w*) And if an indictment for refusing to serve the office of constable on being thereto chosen by a corporation do not set forth the prescription of the corporation so to choose, it is bad; for a corporation has no power of common right to choose a constable. (*x*)

(*r*) Rex *v.* Lowe, 2 Stra. 92. Rex *v.* Chapple, 3 Campb. 91.

(*s*) Rex *v.* Harpur, 5 Mod. 96. Fletcher *v.* Ingram, 5 Mod. 127.

(*t*) Rex *v.* Jones, 2 Stra. 1115. S. C. 7 Mod. 410. 1 Bott. 338.

(*u*) Rex *v.* Jones, 1 Bott. 338.

(*w*) Rex *v.* Harpur, 5 Mod. 96.

(*x*) Rex *v.* Bernard, 2 Salk. 52. 1 Lord Raym. 91.

CHAPTER THE SIXTEENTH.

Of Buying and Selling Offices.

CONCERNING the sale of offices of a public nature, it has been well observed, that nothing can be more palpably prejudicial to the good of the public, than to have places of the highest concernment, on the due execution whereof the happiness of both king and people depends, disposed of, not to those who are most able to execute them, but to those who are most able to pay for them; nor can any thing be a greater discouragement to industry and virtue than to see those places of trust and honour, which ought to be the rewards of persons who by their industry and diligence have qualified themselves for them, conferred on those who have no other recommendation but that of being the highest bidders; neither can any thing be a greater temptation to officers to abuse their power by bribery and extortion, and other acts of injustice, than the consideration of the great expence they were at in gaining their places, and the necessity of sometimes straining a point to make their bargain answer their expectations. (*a*)

Offence at common law.

The buying and selling of such offices has therefore been considered as an offence *malum in se*, and indictable at common law. (*b*) In a late case of an indictment for a conspiracy to obtain money, by procuring from the lords of the treasury the appointment of a person to an office in the customs, it was proposed to argue on behalf of one of the

(*a*) 1 Hawk. P. C. c. 67. s. 3. 5 Bac. Abr. 191, *Offices and Officers*.

(*b*) Stockwell *v.* North, Noy 102. Moor 781. S. C.

defendants, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or to purchase an office like that of coast waiter. But Lord Ellenborough, C. J. said that if that were to be made a question it must be debated on a motion in arrest of judgment, or on a writ of error: but that, after reading the case of Rex v. Vaughan, (*c*) it would be very difficult to argue that the offence charged in the indictment was not a misdemeanor. And Grose, J. afterwards, in passing sentence, said that there could be no doubt but that the offence charged was clearly a misdemeanor at common law. (*d*)

Attempt to bribe a minister to give an office.

The case of Rex v. Vaughan cited by Lord Ellenborough was, an *attempt* only to bribe a cabinet minister and a member of the privy council, to give the defendant an office in the colonies. (*e*) And in a case where the defendant, who was clerk to the agent for the *French* prisoners of war at *Porchester Castle*, took bribes in order to procure the exchange of some of them out of their turn, it appears to have been the subject of an indictment. (*f*)

Statutes.

But it has been endeavoured to prevent the mischiefs of buying and selling offices, by the enactments of several statutes.

12 Rich. II. c. 2. Chancellor, &c. to be sworn that they will not make officers for any gift, &c.

The 12 Rich. II. c. 2. enacted "that the chancellor, "treasurer, keeper of the privy seal, steward of the king's "house, the king's chamberlain, clerk of the rolls, the jus- "tices of the one bench and of the other, barons of the "exchequer, and all other that shall be called to ordain, "name, or make, justices of the peace, sheriffs, escheators,

(*c*) 4 Burr. 2494.

(*d*) Rex v. Pollman and others, 2 Camph. 229.

(*e*) 4 Burr. 2494. A criminal information was granted against the defendant for offering the duke of Grafton, then first lord of the treasury, the sum of £5,000 as a bribe to procure the reversion of the office of clerk of the supreme court of the island of Jamaica.

(*f*) Rex v. Beale cited in Rex v. Gibbs, 1 East. R. 183.

"customers, comptrollers, or any other officer or minister "of the king, shall be firmly sworn that they shall not or- "dain, name, or make, any of the abovementioned officers "for any gift or brocage, favour or affection; nor that none "which pursueth by himself, or by other, privily or openly, "to be in any manner of office, shall be put into the same "office, or in any other, but that they make all such of- "ficers and ministers of the best and most lawful men, and "sufficient to their estimation and knowledge." (g)

The 4 Hen. IV. c. 5. ordained "that no sheriff shall let "his bailiwick to farm to any man for the time that he occu- "pieth such office." 4 Hen. IV. c. 5.

But a principal statute relating to this subject is the 5 & 6 Edw. VI. c. 16. which, for the avoiding corruption which might thereafter happen in the officers, in places, wherein there is requisite to be had the true administration of justice or services of trust, and to the intent that persons worthy and meet to be advanced should thereafter be preferred, enacts, that if any person bargain or sell any office, or deputation of office, or take any money or profit directly or indirectly, or any promise, &c. bond, or any assurance, to receive any money, &c. for any office or deputation of office, or to the intent that any person should have, exercise, or enjoy, any office, or the deputation of any office, which office or any part or parcel thereof shall in any wise concern the administration or execution of justice, or the receipt, controlment, or payment, of the king's treasure, rent, revenue, &c. or any the king's customs, or the keeping the king's towns, castles, &c. used for defence, or which shall concern any clerkship in any court of record where justice is ministered; the offender shall not only forfeit all his right to such office or deputation of office, but also shall be adjudged a person disabled to have, occupy, or enjoy, 5 & 6 Ed. VI. c. 16. Persons selling offices relating to the administration of justice, &c. shall forfeit the office, and be disabled to have such office.

(g) For the exposition of this statute see the earl of Macclesfield's trial, 6 St. Tri. 447. 1c. Howell's St. Tri. 767

such office or deputation. The statute further enacts that such bargains, sales, bonds, agreements, &c. shall be void; (*h*) and provides that the act shall not extend to any office whereof any person shall be seised of any estate of inheritance, nor to any office of the keeping of any park, house, manor, garden, chase or forest. (*i*) It provides also that all judgments given or things done by offenders, after the offence and before the offender shall be removed from the exercise of the office or deputation, shall be good and sufficient in law. And further that the act shall not extend to be prejudicial or hurtful to any of the chief justices of the King's Bench or Common Pleas, or to any of the justices of assize; but that they may do concerning any offices to be granted by them as they might have done before the making of this act. (*k*)

Cases decided upon this statute.

It has been held that the offices of chancellor, registrar, and commissary, in ecclesiastical courts, are within the meaning of this statute; (*l*) also the place of cofferer; (*m*) and that of surveyor of the customs; (*n*) and the place of customer of a port; (*o*) and the offices of collector and supervisor of the excise; (*p*) and in a writ of error on a judgment in *Ireland*, it was held clearly that the offices of clerk of the crown, and clerk of the peace, were within the statute. (*q*) But offices in fee have been held to be out of the statute; (*r*) and the sale of a bailiwick of a hundred is not within it, for such an office does not concern the adminis-

(*h*) S. 3.

(*i*) S. 4.

(*k*) S. 5.

(*l*) 12 Co. 78. 3 Inst. 148. Cro. Jac. 269. 1 Hawk. P. C. c. 67. s. 4.

(*m*) Sir Arthur Ingram's case, 3 Bulst. 91. S. C. Co. Lit. 234, where it is said that the king could not dispense with this statute by any *non obstante*, and Cro. Jac. 385. S. C. is cited.

(*n*) 2 And. 55, 107.

(*o*) 1 H. Blac. 327.

(*p*) Law *v.* Law, Cas. temp. Talb. 140. 3 P. Wms. 391. S. C.

(*q*) Maccarty *v.* Wickford, Trin. 9 Geo. II. B. R. 5 Bac. Abr. 195. *Offices and Officers* (F). It was also held in this case, that the statute did not extend to *Ireland*. But *see post*. 49 Geo. III. c. 126.

(*r*) Ellis *v.* Ruddle, 2 Lev. 151.

tration of justice, nor is it an office of trust. (*s*) It has also been adjudged that a seat in the sixclerk's office is not within the statute, being a ministerial office only; (*t*) and it was held that it did not extend to military officers, (*u*) nor to the purser of a ship, (*w*) but this last decision was doubted; (*x*) and in a later case it was said by Lord Mansfield, that if the lords of the Admiralty were to take money for their warrant to appoint a person to be a purser, it would be criminal in the corrupter and corrupted. (*y*) It was decided also, that this statute did not extend to the plantations. (*z*) But with respect to military and naval commissions, and the different places in the public departments of government, the colonies or plantations, or in the appointment of the East India company, alterations have been made by a recent statute which will be presently mentioned.

An offender against this statute can never afterwards hold the office.

One who makes a contract for an office contrary to the purport of this statute, is so far disabled to hold the same, that he cannot at any time during his life be restored to a capacity of holding it by any grant or dispensation whatever. (*a*)

What deputa-

With regard to the *deputation* of an office, it is held that

(*s*) Godbolt's case, 4 Leon. 33. 4 Mod. 223. S. C. cited.

(*t*) Sparrow *v.* Reynold, Pasch. 26 Car. II. C. B. 5 Bac. Abr. 195. *Offices and Officers* (F).

(*u*) 1 Vern. 98.

(*w*) 2 Vern. 308. Ca. temp. Talb. 40.

(*x*) See 1 H. Blac. 326. where it is said by Lord Loughborough, C. J. that the case in 2 Vern. is contrary to an evident principle of law.

(*y*) Purdy *v.* Stacey, 5 Burr. 2698.

(*z*) Blankard *v.* Galdy, 4 Mod. 222, 2 Salk. 411. 2 Lord Raym. 1245. S. C. cited 2 Mod. 45. S. P. undetermined; and see 5 Bac. Abr. 195. *Offices and Officers* (F). But if the office, though in the plantations, had been granted under the great seal of *England*, the sale of it would have been held criminal at common law. See the judgment of Lord Mansfield in Rex *v.* Vaughan, 4 Burr. 2500.

(*a*) Hob. 75. Co. Lit 234. Cro. Car. 361. Cro. Jac. 386. Ca. temp. Talb. 107.

tion of an office is within the statute.

where an office is within the statute, and the salary is certain, if the principal make a deputation reserving a less sum out of the salary, it is good: so, if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a certain sum out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay unless the profits arise to so much; and though a deputy by his constitution is in place of his principal, yet he has no right to his fees, they still continuing to be the principals; so that, as to him, it is only reserving a part of his own, and giving away the rest to another. But where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, it must be paid at all events; and a bond for performance of such agreement is void by the statute. (*b*)

49 Geo III. c. 126. extends the 5 & 6 Edw. VI. c. 16. to *Scotland* and *Ireland*, to public offices in this country and in the colonies, and to offices under the East India company.

But this statute has been much extended by the 49 Geo. III. c. 126. which, after reciting it, enacts, "that all "the provisions therein contained shall extend to *Scotland* "and *Ireland*, and to all offices in the gift of the crown, or "of any office appointed by the crown; and all commissions "civil, naval, or military; and to all places and employ- "ments, and to all deputations to any such offices, com- "missions, places, or employments, in the respective de- "partments or offices, or under the appointment or super- "intendance and controul of the lord high treasurer, or "commissioners of the treasury, the secretary of state, the "lords commissioners for executing the office of lord high "admiral, the master general and principal officers of his "Majesty's ordnance, the commander in chief, the secre- "tary at war, the paymaster general of his Majesty's "forces, the commissioners for the affairs of *India*, the "commissioners of the excise, the treasurer of the navy, "the commisioners of the navy, the commissioners for vic-

(*b*) 5 Bac. Abr. 195. *Offices and Officers* (F). 1 Hawk. P. C. c. 67. s. 5. Salk. 468. 6 Mod. 234. Godolphin v. Tudor, Comb. 356. S. P.

"tualling, the commissioners of transports, the commissary "general, the storekeeper general, and also the principal "officers of any other public department or office of his "Majesty's government, in any part of the united kingdom, "or in any of his Majesty's dominions, colonies, or planta- "tions, which now belong or may hereafter belong to his "Majesty; and also to all offices, commissions, places, and "employments, belonging to or under the appointment or "controul of the East India company, (*c*) in as full and "ample a manner as if the provisions of the said act were "repeated and made part of this act: and the said act and "this act shall be construed as one act, as if the same had "been herein repeated and re-enacted."

49 Geo. III. c. 126. s. 3. Persons buying or selling, or receiving or paying money or rewards for offices, guilty of misdemeanor.

The third section of this statute enacts, "that if any per- "son or persons shall sell or bargain for the sale of, or re- "ceive, have, or take any money, fee, gratuity, loan of mo- "ney, reward, or profit, directly or indirectly, or any pro- "mise, agreement, covenant, contract, bond or assurance; "or shall by any way, device, or means, contract or agree "to receive or have any money, fee, gratuity, loan of mo- "ney, reward or profit, directly or indirectly; and also if "any person or persons shall purchase, or bargain for the "purchase of, or give or pay any money, fee, gratuity, loan "of money, reward or profit, or make or enter into any pro- "mise, agreement, covenant, contract, bond or assurance to "give or pay any money, fee, gratuity, loan of money, re- "ward, or profit; or shall by any ways, means, or device, "contract or agree to give or pay any money, fee, gratuity, "loan of money, reward or profit, directly or indirectly, for "any office, commission, place, or employment, specified "or described in the said recited act (5 and 6 Edw. VI. c.

(*c*) By the 33 Geo. III. c. 52. s. 66. it was enacted that the making or entering into, or being a party to any corrupt bargain or contract, for the giving up or obtaining, or in any other manner touching or concerning the trust and duty of any office or employment under the crown, or the *East India* company, by any British subject there resident, should be deemed a misdemeanor.

" 16.) or this act, or within the true intent or meaning of " the said act, or this act, or for any deputation thereto, or " for any part, parcel, or participation of the profits there- " of, or for any appointment or nomination thereto, or re- " signation thereof, or for the consent or consents, or voice " or voices, of any person or persons to any such appoint- " ment, nomination, or resignation; then and in every " such case, every such person, and also every person who " shall wilfully and knowingly aid, abet, or assist, such per- " son therein, shall be deemed and adjudged guilty of a " misdemeanor."

49 Geo. III. c. 126. s. 4. Persons receiving or paying money for soliciting or obtaining offices, and any negociations or pretended negociations relating thereto, guilty of a misdemeanor.

The fourth section enacts, " that if any person or persons " shall receive, have, or take, any money, fee, reward, or " profit, directly or indirectly, or take any promise, agree- " ment, covenant, contract, bond, or assurance, or by any " way, means, or device, contract or agree to receive or have " any money, fee, gratuity, loan of money, reward or profit, " directly or indirectly, for any interest, solicitation, peti- " tion, request, recommendation, or negociation what- " ever, made or to be made, or pretended to be made, or " under any pretence of making, or causing or procuring to " be made, any *interest, solicitation, petition, request, recom-* " *mendation, or negociation*, in or about or in any wise " touching, concerning, or relating to, any nomination, ap- " pointment, or deputation to, or resignation of, any such " office, commission, place, or employment, as aforesaid, or " under any pretence for using or having used any interest, " solicitation, petition, request, recommendation, or nego- " ciation, in or about any such nomination, appointment, " deputation, or resignation, or for the obtaining or having " obtained the consent or consents, or voice or voices, of " any person or persons as aforesaid to such nomination, " appointment, deputation, or resignation; and also if any " person or persons shall give or pay, or cause or procure " to be given or paid, any money, fee, gratuity, loan of " money, reward or profit, or make, or cause, or procure " to be made, any promise, agreement, covenant, contract,

"bond, or assurance, or by any way, means, or device, "contract or agree, or give or pay, or cause or pro- "cure to be given or paid, any money, fee, gratuity, loan "of money, reward, or profit, for any solicitation, petition, "request, recommendation, or negociation whatever, made "or to be made, that shall in any wise touch, concern, or "relate to, any nomination, appointment, or deputation "to, or resignation of, any such office, commission, place, or "employment as aforesaid, or for the obtaining or having "obtained, directly or indirectly, the consent or consents, "or voice or voices, of any person or persons as aforesaid, "to any such nomination, appointment, deputation, or re- "signation; and also if any person or persons shall, for or in "expectation of gain, fee, gratuity, loan of money, reward, "or profit, solicit, recommend, or negociate, in any manner "for any person or persons, in any matter that shall in any "wise touch, concern, or relate to, any such nomination, "appointment, deputation, or resignation aforesaid, or for "the obtaining, directly or indirectly, the consent or con- "sents, or voice or voices, of any person or persons to any "such nomination, appointment, or deputation, or resigna- "tion aforesaid, then and in every such case every such "person, and also every person who shall wilfully and "knowingly aid, abet, or assist, such person therein, shall "be deemed and adjudged guilty of a misdemeanor."

49 Geo. III. c. 126. s. 5. Keeping any place for business relating to such traffic in offices, a misdemeanor.

By the fifth section of the act, if any person shall open or keep any house or place for the soliciting or negociating any business relating to vacancies in offices, &c. in or under any public department, or to the sale or purchase of such offices, or appointment to them, or resignation, transfer, or exchange of them, such offender, and every person aiding or assisting therein, is guilty of a misdemeanor. And by the sixth section any person advertising any office, place, &c. or the name of any person as broker, &c. or printing any advertisement or proposal for such purposes, is liable to a penalty of 50*l.*

£50. penalty on advertising, &c.

Exceptions from this statute of certain offices, and also of commissions in his Majesty's forces at the prices regulated by regimental agents.

There are, however, several exceptions from the provisions of this statute. It does not extend to commissions or appointments in the band of *gentlemen pensioners*, or in his Majesty's yeoman guard, or in the marshalsea, or the court of the king's palace at Westminster; or to purchases and exchanges of commissions in his Majesty's forces, at the regulated prices; or to any thing done in relation thereto, by authorised regimental agents not advertising and not receiving money, &c. in that behalf. (*d*) But officers receiving or paying, or agreeing to pay, more than the regulated prices, or paying agents for negociating, on conviction by a court martial, are to forfeit their commissions and be cashiered. (*e*)

But persons selling commissions for more than the regulated prices, are guilty of misdemeanor.

And it is provided also, that every person who shall sell his commission in his Majesty's forces, and not continue to hold any commission, and shall upon or in relation to such sale receive, directly or indirectly, any money, &c. beyond the regulated price of the commission sold, and every person who shall aid or assist such person therein, shall be guilty of a misdemeanor.

Further exceptions as to offices excepted from 5 and 6 Edw. VI. c. 16. and as to offices legally saleable.

This act contains further exceptions; and provides, that it shall not extend to any office excepted from the 5 and 6 Edw. VI. c. 16. or to any office which was legally saleable before the passing of this act, and in the gift of any person by virtue of any office of which such person is or shall be possessed under any patent or appointment for his life; or to render invalid, or in any manner to affect, any promise, covenant, trust, &c. entered into or declared before the passing of this act, and which then was valid in law or equity. (*f*)

(*d*) 49 Geo. III. c. 126. s. 7. and the 53 Geo. III. c. 54. excepts purchases, &c. of any commissions or appointments in the battle-axe guards in *Ireland*.

(*e*) 49 Geo. III. c. 126. s. 8. And the commission is to be sold, and half the produce, not exceeding 500*l.* to be paid to the informer, and the remainder to go to the king.

(*f*) *Id.* S. 9.

Deputations. 49 Geo. III. c. 126.

With respect to *deputations* to offices, it is enacted, that the act shall not extend to prevent or make void any deputation to any office, in any case in which it is lawful to appoint a deputy, or any agreement, &c. lawfully made in respect of any allowance or payment to such principal or deputy respectively, out of the fees or profits of such office. (*g*)

Annual payments out of the fees to any person formerly holding the office.

Annual reservations, charges, or payments, out of fees or profits of any office, to any person who shall have held such office, in any commission, or appointment of any person succeeding to such office, and agreements, &c. for securing such reservations, charges, or payments, are also excepted: provided that the amount of the reservations, &c. and the circumstances and reasons under which they shall have been permitted, shall be stated in the commission or instrument of appointment of the successor. (*h*)

Right of appointment when forfeited vests in the king.

The statute contains an enactment, that when the right, estate, or interest, of any person shall be forfeited under any of its provisions, or the provisions of the 5 and 6 Edw. VI. c. 16. the right of such appointment shall vest in and belong to the king. (*i*)

Trial of offences committed abroad.

Offences against this act, or the 5 and 6 Edw. VI. c. 16. by any governor, lieutenant-governor, or person having the chief command, civil or military, in his Majesty's dominions, colonies, or plantations, or his secretary, may be prosecuted and determined in the court of King's Bench at *Westminster*, in the same manner as any crime, &c. committed by any person holding a public employment abroad, may be prosecuted under the provisions of the 42 Geo. III. c. 85. (*k*)

(*g*) 49 Geo. III. c. 126. s. 10. And see *ante*, 231, 232.

(*h*) *Id.* S. 11. The twelfth section contains an exception as to the masters, six clerks, and examiners, of the chancery in *Ireland*, till after the death, &c. of the present possessors.

(*i*) *Id.* S. 2.

(*k*) *Id.* S. 14.

Punishment of misdemeanors in *Scotland.*

It is enacted also, that any person who shall commit in *Scotland* any misdemeanor against this act, shall be liable to be punished by fine and imprisonment, or by the one or the other of such punishments, as the judge or judges, before whom the offender shall be committed, may direct. (*l*)

49 Geo. III. c. 118. s. 3. Giving any office, &c. for election purposes.

By the 49 Geo. III. c. 118. s. 3. if any person give or promise any office, place, or employment, upon *any express contract or agreement* to procure, or endeavour to procure, the return of any person to serve in parliament, the person returned shall vacate his seat, and be incapacitated to serve during that parliament for the same place; and the person receiving the office, &c. shall forfeit it, be incapacitated for holding it, and shall forfeit 500*l.*: and any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such *express contract or agreement*, shall forfeit the sum of 1000*l.* (*m*)

(*l*) 49 Geo. III. c. 126. s. 13.

(*m*) See this act more at length in the subsequent chapter on *Bribery*, p. 215, 216.

CHAPTER THE SEVENTEENTH.

Of Bribery.

BRIBERY is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity. (*a*) And it seems that this offence will be committed by any person in an official situation, who shall corruptly use the power or interest of his place for rewards or promises: as in the case of one who was clerk to the agent for *French* prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. (*b*) And bribery sometimes signifies the taking or giving of a reward for offices of a public nature. (*c*) Corrupt and illegal practices in giving rewards or making promises, in order to procure votes in the elections of members to serve in parliament, are also denominated bribery, and punishable by common law, and by statute. (*d*) And the attempt to influence persons serving as jurymen corruptly to one side, by gifts or promises, (which, with other practices tending to influence a jury, will be considered in treating of the crime called *embracery*, (*e*)) may be mentioned as a species of bribery.

Cases of bribery.

(*a*) 3 Inst. 149. 1 Hawk. P. C. c. 67. s. 2. 4 Blac. Com. 139.

(*b*) Rex *v.* Beale, E. 38. Geo. III. cited in Rex *v.* Gibbs, 1 East. R. 183. and see Rex *v.* Vaughan, 4 Burr. 2494, *ante*, 228.

(*c*) 1 Hawk. P. C. c. 67. s. 3. As to this species of bribery, see the preceding Chapter.

(*d*) Rex *v.* Pitt and Another, 3 Burr. 1338. 2 Geo. II. c. 24. 49 Geo. III. c. 118.

(*e*) *Post*, Chap. XXII.

Attempts to bribe.

The law abhors the least tendency to corruption; and upon the principle which has been already mentioned, of an attempt to commit even a misdemeanor, being itself a misdemeanor, (*f*) *attempts to bribe*, though unsuccessful, have in several cases been held to be criminal. Thus it is laid down generally, that if a party offers a bribe to a judge meaning to corrupt him in a case depending before him, and the judge takes it not; yet this is an offence punishable by law in the party that offers it. (*g*) And it has been held to be a misdemeanor to attempt to bribe a cabinet minister, and a member of the privy council, to give the defendant an office in the colonies. (*h*). And an information was granted against a man for promising money to a member of a corporation, to induce him to vote for the election of a mayor. (*i*) An information also appears to have been exhibited against a person for attempting by bribery to influence a juryman in giving his verdict. (*k*)

24 Geo. III. c. 47. s. 32. Officers taking bribes not to do their duty in relation to the customs and excise: and persons offering bribes to officers to neglect their duty, liable to penalties.

Several of the statutes relating to the customs and excise impose penalties, as well upon officers taking bribes as upon those who offer them. (*l*) The 24 Geo. III. c. 47. s. 32. enacts, that if any officer of the navy, customs, or excise, shall make any collusive seizure, or shall deliver up, or agree to deliver up, or not to seize any vessel or goods liable to forfeiture by that or any other act, or shall directly or indirectly receive any bribe, gratuity, recompence, or reward, for the neglect or non-performance of his duty, such officer shall forfeit 500*l.* and be incapable of serving his Majesty in any office or employment, civil or military: and if any person shall give, offer, or promise to give, any bribe, recompence, or reward to, or make any collusive agreement with, any officer of the navy, customs, or excise,

(*f*) *Ante*, Book I. Chap. 3. p. 62.

(*g*) 3 Inst. 147. Rex *v.* Vaughan, 4 Burr. 2500, *ante*, 228.

(*h*) Vaughan's case, 4 Burr. 2494. *ante*, 228, and see Rex *v.* Pollman and others, 2 Camph. 229.

(*i*) Plympton's case, 2 Ld. Raym. 1377.

(*k*) Young's case, cited in Rex *v.* Higgins, 2 East. R. 11. and 16.

(*l*) As 15 Car. II. c. 11. s. 16. and 11 Geo. I. c. 30.

to do, conceal, or connive at any act, whereby the provisions of the act relative to the customs or excise may be evaded or broken, such person shall (whether the offer, proposal, &c. be accepted or performed or not,) forfeit five hundred pounds.

Bribery at elections for members of parliament was always a crime at common law, and consequently punishable by indictment or information: (*m*) but in order to enforce the common law, and because it had not been found sufficient to prevent the evil, considerable penalties have been imposed upon this offence by different statutes.

Bribery at elections for members of parliament.

The 7 and 8 W. III. c. 7. s. 4. enacts, that all contracts, promises, bonds, and securities, to procure any return of any member to serve in parliament, or any thing relating thereunto, shall be void; and that whoever makes or gives such contract, security, promise, or bond, or any gift or reward, to procure a false or double return, shall forfeit three hundred pounds. (*n*)

7 & 8 W. III. c. 7. s. 4. Contracts, &c. to procure election void, and persons making them to forfeit 300*l.*

The statute 2 Geo. II. c. 24. s. 7. enacts, "that if any "person who shall have, or claim to have, any right to vote "in any election of any member to serve in parliament, "shall ask, receive, or take any money or other reward, by "way of gift, loan, or other device, or agree or contract "for any money, gift, office, employment, or other reward "whatsoever, to give his vote, or to refuse or forbear to "give his vote in any such election; or if any person by "himself or any person employed by him, shall by any gift "or reward, or by any promise, agreement, or security, for

2 Geo. II. c. 24. s. 7. Persons taking money, &c. for voting or forbearing to vote, and persons procuring others to vote, or forbear to vote, by any gift, &c. forfeit 500*l.* and are disabled to

(*m*) Rex *v.* Pitt and another, 3 Burr. 1335. by Lord Mansfield, C. J.

(*n*) One-third to the king, one-third to the poor of the place concerned, and one-third to the informer, with his costs, to be recovered by action or information. But if it appears to be a void election, an action for this penalty is not maintainable. 1 Hawk. P. C. c. 67. s. 8. in the *margin*.

vote in any election, and to hold any office or franchise.

"any gift or reward, corrupt or procure any person or per-
"sons to give his or their vote or votes, or to forbear to
"give his or their vote or votes in any such election, such
"person so offending, in any of the cases aforesaid, shall,
"for every such offence, forfeit five hundred pounds." And further, that such offender after judgment against him in any action, or information, or summary action or prosecution, or being otherwise lawfully convicted thereof, shall for ever be disabled to vote in any election of any member to parliament, and to hold any office or franchise, as if such person was naturally dead.

2 G. II. c. 24. s. 8. Offenders discovering others in 12 months after the election indemnified.

The eighth section enacts, "that if any person offending
"against the act shall, within the space of twelve months
"next after such election, discover any other person or per-
"sons offending against this act, so that such person or
"persons so discovered be thereupon convicted, such per-
"son so discovering, and not having been before that time
"convicted of any offence against this act, shall be indemni-
"fied and discharged from all penalties and disabilities
"which he shall then have incurred by any offence against
"this act." The eleventh section provides, that no person shall be liable to any incapacity, disability, forfeiture, or penalty, unless a prosecution be commenced within *two years* after the incapacity, &c. shall be incurred, or, in case of a prosecution, the same be carried on without wilful delay.

Prosecutions must be within two years.

This statute does not take away the common law crime. But the court of King's Bench will rarely proceed by information.

It has been holden that, notwithstanding this statute, bribery in elections of members to serve in parliament still remains a crime at common law; that the legislature never meant to take away the common law crime, but to add a penal action; and that this appears by the words in the statute "or being otherwise lawfully convicted thereof."(*o*) And a conviction upon an information granted by the court of King's Bench is just the same as if the party had been

(*o*) Rex *v.* Pitt and another, 3 Burr. 1335. S. C. 1 Blac. R. 380.

convicted upon an indictment. (*p*) But as the offender will be equally liable to the penalties of the statute, (*q*) that court will not interpose by information until the two years are expired, in ordinary cases; though there may possibly be particular cases, founded on particular reasons, where it may be right to grant informations before the expiration of the time limited for commencing the prosecution on the statute. (*r*) And in one case where the defendant had been convicted of bribery, and the time for bringing the penal action was not expired, the court permitted him to enter into a recognizance to appear at the expiration of that time. (*s*)

Construction of the statute.

Where a friend of the candidate gave an elector five guineas to vote, and took from him a note for that sum, but at the same time gave a counter note to deliver up the first note when the elector had voted, it was held to be an absolute gift and bribery within the act, although the elector voted for the opposite party. (*t*) And laying a wager with the voter that he does not vote for a particular candidate is also bribery within the act. (*u*) In an action upon this sta-

(*p*) Rex *v.* Pitt and another, 3 Burr. 1339.

(*q*) Coombe *v.* Pitt, 1 Blac. R. 524.

(*r*) Rex *v.* Pitt and another, 3 Burr. 1340.

(*s*) Rex *v.* Heydon, 3 Burr. 1359. But where that time had expired the court held that the circumstance of the witness, by whose evidence the defendant was convicted of bribery, being under prosecution for perjury, was no ground for postponing the judgment. Rex *v.* Haydon, 3 Burr. 1387. S. C. 1 Blac. R. 404. And the court refused to stay judgment upon the *postea* where they were moved to do so on the ground that the defendant had made a discovery of another person offending against the statute, who had been convicted on his (the defendant's) evidence. Pugh *v.* Curgenven, 3 Wils. 35. And see the cases collected in 1 Hawk. P. C. c. 67. s. 10. note (4) where see also as to the court of King's Bench granting a new trial.

(*t*) Sulston *v.* Norton, 3 Burr. 1235. 1 Blac. Rep. 317.

(*u*) 1 Hawk. P. C. c. 67. s. 10. note (4), citing Lloft 552. and referring also to Allen *v.* Hearne, 1 T. R. 56. where a wager between two voters, with respect to the event of an election, laid before

tute it has been held, that, before the time of election, any one is a candidate for whom a vote is asked; and that it is not competent to the defendant to dispute a man's right of voting when he has asked him for his vote; it being immaterial whether the voter bribed had a right to vote or not, if he claimed to have such right. (*w*) It seems that a declaration upon this statute must state what the bribe was, and specify that the defendant took money or some other particular species of reward; and where it stated generally "that the defendant did receive *a gift or reward*," in the disjunctive, it was held bad, and that the defect might be taken advantage of in arrest of judgment, the charge being of a criminal nature. (*x*)

Who shall be deemed a *discoverer* within the eighth section of the 2 G. II. c. 24. so as to be indemnified.

As to the person who shall be considered as a *discoverer* within the eighth section of the statute, so as to be indemnified from its penalties, it has been decided that the circumstance of a party having been, within the limited time, a plaintiff in an action on the statute, and having prosecuted it to judgment, does not prove him to have been the first discoverer. Lord Mansfield, C. J. observed, that the court had not said, nor would say, that a plaintiff *cannot* be the discoverer; but that the act does not *make* him so, or *consider* him as the discoverer; and that as the plaintiff could not be the witness himself in the action, some other person must have been the witness; it was not therefore to be presumed, without any evidence of it, that the plaintiff in the action was the first discoverer. (*y*) And where one person procured another to make an affidavit of facts amounting to bribery, and then prosecuted a third person upon those facts to conviction and judgment, it was held that the person making the affidavit was the discoverer. (*z*) With respect to what shall be deemed a *conviction* within this section, it

the poll began, was held to be illegal.

(*w*) Combe *v.* Pitt, 1 Blac. R. 523.

(*x*) Davy *v.* Baker, 4 Burr. 2471.

(*y*) Curgenven *v.* Cuming, 4 Burr. 2504.

(*z*) Sibly *v.* Cuming, 4 Burr. 2464.

has been held that a verdict will not be sufficient, and that there must be a judgment; but that when the judgment is obtained it will relate, for the purpose of the indemnity, to the time when the discovery was first made. (*a*)

A recent statute, 49 Geo. III. c. 118, reciting that the giving money, &c. in order to procure the return of a member to parliament, if not given to or for the use of some person having a right, or claiming to have a right, to act as returning officer, or to vote at the election, is not bribery within the former statute, (2 Geo. II. c. 24.) enacts, that if any person shall give, or cause to be given, directly or indirectly, or promise, or agree to give, any money, gift, or reward, upon any engagement or agreement that the person to whom, to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to parliament for any place, he shall, if not returned himself to parliament for such place, for every such gift or promise forfeit one thousand pounds; and if returned, and having given, or promised to give, or knowing of and consenting to such gifts or promises, shall be disabled and incapacitated to serve in that parliament for such place, and shall be as if he had never been returned or elected a member of parliament. And it enacts also, that any person who shall receive or accept of by himself, or by any other, to his use or on his behalf, any such money, gift, or reward, or any promise upon any such engagement, contract, or agreement, shall forfeit the value and amount of such money, gift, or reward, over and above the sum of five hundred pounds. (*b*)

49 Geo. III. c. 118. s. 1. imposes penalties on persons giving or receiving money, &c. to procure the election of a member to parliament, though such money, &c. be not given to voters.

The third section of this statute enacts, that if any person

49 G. III. c. 118. s. 3. im-

(*a*) Sutton *v.* Bishop, 1 Blac. R. 665.

(*b*) S. 1. The second section provides that the act shall not extend to any money paid, or agreed to be paid, to or by any person, for any legal expence *bonâ fide* incurred at or concerning any election.

poses penalties upon persons giving or receiving offices, &c. by way of bribes to procure the return of members to parliament.

shall by himself, or by any other, give or procure to be given, or promise to give or procure to be given, any office, place, or employment, upon any *express* contract or agreement that the person to whom, or to whose use, or on whose behalf, such gift or promise shall be made, shall by himself, or by any other at his request or command, procure, or endeavour to procure, the return of any person to parliament for any place, such person so returned, and so having given or procured to be given, or so promised to give or procure to be given, or knowing of and consenting to such gift or promise upon any such *express* contract or agreement, shall be disabled and incapacitated to serve in that parliament for such place, and be deemed no member of parliament, and as if he had never been returned; and any person who shall receive or accept of by himself or by any other, to his use or on his behalf, any such office, place, or employment, upon such *express* contract or agreement, shall forfeit such office, &c. and be incapacitated for holding the same, and shall forfeit five hundred pounds. And it further enacts, that any person holding any office under his Majesty, who shall give such office, appointment, or place, upon any such *express* contract or agreement that the person to whom, or for whose use, such office, &c. shall have been given, shall so procure, or endeavour to procure, the return of any person to parliament, shall forfeit one thousand pounds.

49 G. III. c. 118. s. 4. limits prosecutions, &c. to two years after the offence.

The fourth section of the statute enacts, that no person shall be liable to any forfeiture or penalty imposed by the act, unless some prosecution, action, or suit for the offence committed, shall be actually and legally commenced against such person within two years next after the offence committed, and unless such person shall be arrested, summoned, or otherwise served with the writ or process within the same space of time, so as such arrest, summons, or service, shall not be prevented by such person absconding or withdrawing out of the jurisdiction of the court; and in case of any prosecution, suit, or process, the same shall be proceeded in and carried on without any wilful delay.

CHAPTER THE EIGHTEENTH.

Of neglecting or delaying to deliver Election Writs.

THE statute 53 Geo. III. c. 89. was passed for the purpose of effecting the more expeditious and regular conveyance of writs for the election of members to serve in parliament. It enacts, that the messenger, or pursuivant of the great seal, or his deputy, shall, after the receipt of such writs, forthwith carry such of them as shall be directed to the sheriffs of *London* or *Middlesex*, to the respective officers of such sheriffs, and the other writs to the general post office in *London*, and there deliver them to the postmaster general for the time being, or to such other person as the postmaster shall depute to receive the same (which deputation the postmaster is thereby required to make), who on receipt thereof shall give an acknowledgment in writing, expressing therein the time of delivery, and shall keep a duplicate of such acknowledgment signed by the parties respectively to whom and by whom the same shall be so delivered; and that the postmaster or his deputy shall dispatch all such writs free of postage by the first post or mail, after the receipt thereof, under covers directed to the proper officers, to whom the said writs shall be respectively directed, accompanied with proper directions to the postmaster or deputy postmaster of the place, or nearest to the place where such officers shall hold their office, requiring such postmaster or deputy forthwith to carry such writs respectively to such office, and to deliver them there to the officers to whom they shall be respectively directed, or their deputies, who are required to give to such postmaster or deputy a memorandum in writing, acknowledging the receipt of every such writ, and setting forth the day and the

53 Geo. III. c. 89. s. 1. directs the course in which election writs shall be forwarded by the messenger of the great seal, and through the post office.

hour the same was delivered by such postmaster or deputy, which memorandum shall also be signed by such postmaster or deputy, who are required to transmit the same by the first or second post afterwards to the postmaster general or his deputy at the general post office in *London*, who are required to make an entry thereof in a proper book for that purpose, and to file the memorandum along with the duplicate of the said acknowledgment, signed by the messenger, to the intent that the same may be inspected or produced upon all proper occasions by any person interested in such elections. (*a*)

53 G. III. c. 89. s. 2 and 3. Persons to whom such writs are usually directed must give an account of the places of their offices.

The statute, after directing that all persons to whom the writs for the election of members to parliament ought to be and are usually directed, shall, within a month, send to the postmasters general an account of the places where they shall hold their offices, and so from time to time, as often as such places shall be changed, and of the post town nearest to such offices; or in case any such office shall be in *London*, *Westminster*, or *Southwark*, or within five miles thereof, shall send such account to the messenger of the great seal; (*b*) proceeds to enact, that after the death of the then messenger of the great seal the allowances of *mileage* shall cease, except an allowance of two guineas on each writ for the election of a member on any vacancy, and of fifty pounds on the calling of a new parliament. (*c*) And it further enacts, that whereas the messenger of the great seal and his deputy have from time to time received certain other fees for the conveyance and upon the delivery of these writs, such fees shall cease from the passing of the act; and that neither the messenger nor his deputy, nor any other person, shall receive or take any fee, reward, or gratuity whatsoever, for the conveyance or delivery of any such writ. (*d*)

S. 4 and 5. Mileage and other fees abolished, except two guineas on a vacancy, and 50*l.* on a new parliament.

(*a*) 53 Geo. III. c. 89. s. 1.
(*b*) *Id.* s. 2 and 3.
(*c*) *Id.* s. 4.
(*d*) *Id.* s. 5. And the section further proceeds to give to the then messenger an annual allowance for

The sixth section of the statute then enacts, "that every "person concerned in the transmitting or delivery of any "such writ as aforesaid who shall wilfully neglect or delay "to deliver or transmit any such writ, or accept any fee, or "do any other matter or thing in violation of this act, shall "be guilty of a misdemeanor, and may upon any conviction "upon any indictment or information in his Majesty's court "of King's Bench be fined and imprisoned at the discretion "of the court for such misdemeanor."

53 G. III. c. 89. s. 6. Persons acting in violation of the act guilty of a misdemeanor.

Offences committed in *Scotland* may be punished by a fine or imprisonment, as the judge before whom the offender shall be tried and convicted may direct. (*e*)

his life of 520*l.* in compensation for these fees.

(*e*) *Id.* s. 7.

CHAPTER THE NINETEENTH.

Of Dealing in Slaves.

THE 51 Geo. III. c. 23. recites that the two houses of parliament had, in the year 1806, resolved that the *African* slave trade being contrary to the principles of justice, humanity, and sound policy, they would, with all practicable expedition, take effectual measures for its abolition; that in conformity with such resolution, and for the reasons therein stated, that trade was, by an act passed in the forty-seventh year of his present Majesty, declared to be unlawful; (*a*) that it had been found that divers persons not deterred by the provisions and penalties of that act still continued to

(*a*) 47 Geo. III. sess. 1. c. 36. and see 46 Geo. III. c. 52. By these acts various penalties and forfeitures are imposed upon persons engaged in the slave trade; and by a later statute 53 Geo. III. c. 112. the time limited for prosecutions under those statutes is extended to three years after the offence committed. The seventh section of the 51 Geo. III. c. 23. provides that nothing in that act contained shall repeal either the 46 Geo. III. c. 52. or the 47 Geo. III. sess. 1. c. 36. in respect of the forfeitures of ships, &c. thereby respectively imposed, or the remedies thereby given for the recovery thereof, or in respect of any pecuniary penalties thereby imposed; but th those acts shall be in force except so far as the 46 Geo. III. c. 52. is altered or extended by the 47 Geo. III. sess. 1. c. 36. And the eighth section of the 51 Geo. III. c. 23. enacts that all governors, commanders-in-chief, &c. of any colonies, &c. belonging to his Majesty, or to the *African* company in *Africa*, or any African island, and persons authorized by them, may seize vessels, &c. and other things forfeited for any offence against the 46 Geo. III. c. 52. or the 47 Geo. III. sess. 1. c. 36. or either of them, which shall be found upon, or near to the coast of *Africa*, or in any port, &c. thereof, or within the limits of any of the said colonies, &c.

deal and trade in slaves upon the coast of *Africa* and elsewhere, and to carry them for sale by sea; that the house of commons by its resolution in 1810, expressed its indignation at such practices, and resolved speedily to take into consideration such measures as might tend effectually to prevent such daring violations of the law; and that it was fit that such measures should be extended to the effectual abolition of the slave trade wheresoever it might be attempted to put it in practice.

51 Geo. III. c. 23. s. 1. Persons engaged in the slave trade declared to be felons.

The statute then enacts "that if any subject or subjects "of his Majesty, or if any person or persons residing or "being within this united kingdom, or in any of the islands, "colonies, dominions, forts, settlements, factories, or territories, now or hereafter belonging thereto, or being in his "Majesty's occupation or possession, or under the government of the East India company, shall by him or themselves, or by his or their factors or agents or otherwise howsoever, carry away or remove, or aid or assist in the carrying away or removing as a slave or slaves, or for the purpose of being sold, transferred, used, or dealt with, as a slave or slaves, any person or persons whatsoever from any part of *Africa*, or from any other country, territory, or place whatsoever, either immediately or by transhipment at sea or otherwise, directly or indirectly; or shall import or bring, or aid or assist in the importing or bringing into any island, colony, country, territory, or place whatsoever, any such person or persons as aforesaid, for the purpose aforesaid; or shall knowingly and wilfully ship, embark, receive, detain, or confine, on board any ship, vessel, or boat, any such person or persons as aforesaid for the purpose of his, her, or their, being so carried away, or removed, imported, or brought, as aforesaid; or of being sold, transferred, used, or dealt with as a slave or slaves; or shall knowingly and wilfully use or employ, or permit to be used or employed, or let, or take to freight or on hire, any ship or vessel to be used or employed in carrying away or removing, importing or bring-

" ing, or for the purpose of carrying away or removing,
" importing, or bringing, as aforesaid, any such person or
" persons, as a slave or slaves, or for the purpose of his her
" or their being sold, transferred, used, or dealt with, as a
" slave or slaves; or shall fit out or cause to be fitted out,
" or shall take the charge or command of, or navigate, or
" enter and embark on board any such ship or vessel, as
" master or captain, mate, supercargo, or surgeon, knowing
" that such ship or vessel is actually employed, or is, in
" the same voyage for which he or they shall so enter and
" embark on board, intended to be employed in carrying or
" removing, importing or bringing as aforesaid, any such
" person or persons, as or for the purpose of his her or
" their being sold, transferred, used, or dealt with, as a slave
" or slaves; then and in every such case the person or per-
" sons so offending, and their counsellors, aiders, and abet-
" tors, shall be and are hereby declared to be felons, and
" shall be transported beyond seas for a term not exceed-
" ing fourteen years; or shall be confined and kept to
" hard labour for a term not exceeding five years, nor
" less than three years, at the discretion of the court be-
" fore whom such offender or offenders shall be tried and
" convicted."

51 G. III. c. 23. s. 2. Persons serving on board, engaged as petty officers, &c. or under writing policy on such ship, guilty of a misdemeanor.

The second section enacts, " that if any person or per-
" sons shall enter or navigate, or embark on board any such
" ship or vessel used and employed, or meant and intended
" to be used and employed as aforesaid, as a petty officer,
" servant, or seaman, or petty officers, servants or seamen,
" knowing that such is or shall be the purpose, or one of
" the purposes, of the voyage; or if any person or persons
" shall underwrite, or procure to be underwritten, any
" policy of assurance upon any ship or vessel, or goods, or
" the freight of any ship or vessel employed, or intended to
" be employed, in any such voyage, knowing that such is or
" shall be the purpose, or one of the purposes, of the said
" voyage, he or they nevertheless shall not be deemed guilty
" of a felony within the meaning of this act, but shall be

"guilty of a misdemeanor only; and shall be punished by "imprisonment for a term not exceeding two years."

The third section declares "that such persons shall not "be deemed to be, nor shall be punished as, accessories to "felony." S. 3. Such persons not accessories.

The statute then provides that nothing contained in it shall extend to any person removing from one British settlement, &c. in the West Indies to another, or from one part of such settlement, &c. to any other part of the same, or for importing into any such settlement, &c. any slaves born within such settlements, &c. or any slaves lawfully imported or brought into the said settlements, &c. or for removing any slaves from one part of any foreign settlement, &c. to another part of the same foreign settlement, &c. or for transhipping and assisting at sea any slaves in any vessel in distress. And it provides also that the act shall not extend to prevent the transportation to any foreign place of any slaves convicted in any *British* island or colony, of any crime to which the punishment of transportation is annexed by the law of such island or colony; but that in such case a copy of the sentence certified by the court shall be put on board in the vessel in which any such convict shall be transported. (*b*)

S. 4. But slaves may be removed from one British settlement to another, &c.

And may be transported to foreign places if convicted of crimes.

All offences declared in this act to be felonies or misdemeanors, and committed in *Africa*, or in any other country, &c. than the united kingdom, or on the high seas, or in any port, &c. where the admiral has jurisdiction, are to be enquired of, either according to the ordinary course of law and the provisions of the 28 Hen. VIII. c. 15.; (*c*) or according to the provisions of the 33 Hen. VIII. c. 23. (*d*) so far as the same are now unrepealed; or according to the provisions of the 11 & 12 W. III. c. 7.

S. 6. Trial of offences.

(*b*) S. 4.

(*c*) *Ante*, Chap. on Piracy, p. 135, *et sequ.*

(*d*) *Ante*, Book 1. Ch. 2. p. 57.

51 Geo. III. c. 23. s. 9. Persons sailing in vessels and giving information in a certain time not to be punished.

It is provided by the ninth section of this act that if any person sailing, or being in the capacity of a petty officer, or petty officer's servant, or seaman, on board of any vessel fitted out for or engaged in the slave trade, shall, within three months after the arrival of the vessel at any port belonging to his Majesty, give information on oath, before any competent magistrate, against any owner, or part owner, or any captain, mate, surgeon, or supercargo, of such vessel, who shall have committed any offence against this act, and shall give evidence on oath, against such owner, &c. before any magistrate or court before whom such offender may be tried; or if such person so sailing in the capacity of a petty officer, mariner, or servant, shall, within three months after his arrival at any port or place not within his Majesty's dominions, give information to any of his Majesty's ambassadors, &c. residents, or other agents, so that any person or persons owning such vessel, or navigating or taking charge of the same as captain, mate, surgeon, or supercargo, may be apprehended, such person so giving such information and evidence shall not be liable to the pains or penalties of this act, or any fine or other punishment under the 46 Geo. III. c. 52. or the 47 Geo. III. sess. 1. c. 36. but shall be wholly discharged therefrom. (*e*)

(*e*) The ambassadors, &c. residents, or other agents, are required to receive such information, and transmit the particulars without delay to one of his Majesty's principal secretaries of state, and to transmit copies of the same to the commanders of his Majesty's ships or vessels then being in the said port or place.

CHAPTER THE TWENTIETH.

Of Forestalling, Regrating, and Ingrossing, and of Monopolies.

EVERY practice or device by act, conspiracy, words, or news, to enhance the price of victuals or other merchandize, has been held to be unlawful; as being prejudicial to trade and commerce, and injurious to the public in general. (*a*) Practices of this kind come under the notion of forestalling; which anciently comprehended, in its signification, regrating and ingrossing, and all other offences of the like nature. (*b*) Spreading false rumours, buying things in the market before the accustomed hour, or buying and selling again the same thing in the same market, are offences of this kind. (*c*) Also if a person within the realm buy any merchandize in gross, and sell the same again in gross, it has been considered to be an offence of this nature, on the ground that the price must be thereby enhanced, as each person through whose hands it passed would endeavour to make his profit of it. (*d*) So the bare engrossing of a whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at the common law; for if such practices were allowed, a rich man might engross into his hands a whole commodity, and then sell it at what price he should think fit. (*e*) And so jealous is the common law of all practices of this kind that

Nature of these offences.

(*a*) 3 Inst. 196. 3 Bac. Abr. 261. *Forestalling* (A).

(*b*) 3 Inst. 195. 3 Bac. Abr. 261. *Forestalling* (A).

(*c*) 1 Hawk. P. C. c. 80. s. 1.

(*d*) 3 Inst. 196. 3 Bac. Abr. 261. *Forestalling* (A). 1 Hawk. P. C. c. 80. s. 3. But it was held that any merchant, whether subject or foreigner, bringing victuals or any other merchandize into the realm, may sell it in gross. 3 Inst. 196.

(*e*) 1 Hawk. P. C. c. 80. s. 3. 3 Inst. 196.

it has been held contrary to law to sell corn in the sheaf; upon the supposition that by such means the market might be in effect forestalled. (*f*)

The statutes on this subject now repealed.

The offences of forestalling, regrating, and ingrossing were for a considerable period prohibited by statutes; and chiefly by the 3 & 4 Edw. VI. c. 21. and 5 & 6 Edw. VI. c. 14; (*g*) but the beneficial tendency of such statutes was doubted, and at length by the 12 Geo. III. c. 71. they were repealed, (*h*) as being detrimental to the supply of the labouring and manufacturing poor of the kingdom.

The offences are still punishable at common law.

It has been sometimes contended that forestalling, regrating, and ingrossing, were punishable only by the provisions of these statutes; (*i*) but that doctrine has not been admitted, and they still continue offences at common law; (*k*) though their precise extent and definition at the present day may perhaps admit of some doubt. There is not much to be found in the books concerning the common law upon this subject; and from the time of the 5 & 6 Edw. VI. c. 14. prosecutions for offences of this nature were probably found to be framed with more facility and certainty upon the statute than upon the common law. That statute, it has been observed, is now repealed; but as it particularly describes the offences of forestalling, regrating, and ingrossing, it may be of use to refer to it as containing a parliamentary exposition of the respective terms denoting the several particular offences. (*l*)

(*f*) 3 Inst. 197. 3 Bac. Abr. 261. *Forestalling* (A).

(*g*) Altered by 5 Eliz. c. 5. s. 18. 5 Eliz. c. 12. and 13 Eliz. c. 25. s. 13.

(*h*) The acts repealed are 3 & 4 Edw. VI. c. 21. 5 & 6 Edw. VI. c. 14. 3 Phil. & Mar. c. 3. 5 Eliz. c. 5. 15 Car. II. c. 8. and so much of 5 Ann. c. 31. as relates to butchers selling cattle alive or dead, in London or Westminster, or within ten miles thereof; and all the acts made for the better enforcement of the same.

(*i*) Rex *v.* Maynard, Cro. Car. 231. Rex *v.* Waddington, 1 East. 153.

(*k*) 1 Hawk. P. C. c. 80. s. 15.

(*l*) 1 Hawk. c. 80. s. 15. 2 Burn's Just. *Forestalling*, &c. p. 395, 396. 4 Blac. Com. 158.

Parliamentary exposition of a *forestaller.*

The first section enacted that whosoever should buy or cause to be bought any merchandize, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city, port, haven, creek, or road, from any parts beyond the sea, to be sold; or make any bargain, contract, or promise, for the having or buying the same or any part thereof, so coming as aforesaid, before the said merchandize, victuals, or other things, should be in the market, fair, city, port, haven, creek, or road, ready to be sold; or should make any motion by word, letter, message, or otherwise, to any person, for the enhancing of the price, or dearer selling of any thing above mentioned; or else dissuade, move, or stir, any person coming to the market or fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek, or road, to be sold as aforesaid—should be taken to be a *forestaller.* (*m*)

Of a *regrator.*

The second section enacted that whosoever should by any means regrate, obtain, or get into his hands or possession, in a fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that should be brought to any fair or market to be sold, and should sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof—should be taken to be a *regrator.* (*n*)

(*m*) Forestalling (*forestællan* or *forestallan*) in the English Saxon signifieth properly to *market before the public*, or to *prevent the public market*; and metaphorically, to *intercept* in general: and seemeth derived from *fore*, which is the same as *before*, and *stalle*, a standing place or department, from whence sprang the ancient word *stallage*, which signifieth money paid for erecting a stall or stand for the selling of goods in a fair or market. 2 Burn's Just. 395. *Forestalling*, &c.

(*n*) Regrator is said to be derived from the *French* word *regratement*, for huckstery. 3 Inst 195.

Of an *ingrosser.*

The third section enacted, that whosoever should ingross or get into his hands by buying, contracting, or promise taking, other than by demise, grant, or lease of land or tythe, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, to the intent to sell the same again, should be taken to be an *ingrosser.* (*o*)

Common law offence.

It has been suggested, that at the present day it would probably be holden that no offence is committed, unless the conduct of the party manifests an *intent to raise the price of provisions;* as the mere transfer of a purchase in the market where it is made, the buying articles before they arrive at a public market, or the purchasing of a large quantity of a particular article, can scarcely be regarded as in themselves necessarily injurious to the community. (*p*) And that many cases may occur in which a most laudable motive may exist for buying up large quantities of the same commodity. (*q*) It is stated also, that in one case the court were equally divided on the question, whether regrating is an indictable offence at common law: (*r*) and that it seems therefore, at all times, to be safer to charge in the indictment, that the acts complained of were done with an evil design to raise the price of the article in question. (*s*)

Waddington's case.—Enhancing the price of hops.

In a case which occurred in the year 1800, and in which the defendant was charged by an information, filed against him by leave of the court, with divers acts committed with the intent of enhancing the price of hops, the law relating

(*o*) The vendee cannot sell again in gross, for then he is an ingrosser according to the nature of the word, for that he buy in gross and sell in gross. 3 Inst 195.

(*p*) 2 Chit. Crim. Law, 528. in the notes; referring to Smith's Wealth of Nations, 2 Vol. 309. and the Index, tit. "Labour."

(*q*) 2 Chit. Crim. Law, *ibid.* referring to the arguments, &c. in 14 East. 406. 15 East. 511.

(*r*) Rex *v.* Rushby, Hil. T. 40 Geo. III. 2 Chit. Crim. Law, 536, note (*r*) and 528, in the notes.

(*s*) 2 Chit. Crim. Law, 528, in the notes.

to forestalling, regrating, and ingrossing, was much considered. The defendant being a merchant of credit and affluence in *Kent*, and having a stock of hops in hand, went to the city of *Worcester* for the purpose of speculating how he could enhance the price of that commodity. And for that purpose he declared to the sellers, that hops were too cheap, and to the hop planters, that they had not a fair price for their hops: and in order that his speculation of raising the price of a falling market might not be defeated, he contracted for one-fifth of the produce of *Worcestershire* and *Herefordshire* when he had a stock in hand, and admitted that he did not want to purchase. For this conduct the information was filed against him, containing many counts, (*t*) upon which he was convicted generally; and upon his being brought up to receive judgment, the questions as to his having committed any offence at all, and as to the nature of that offence, if any had been committed, were discussed by

(*t*) There were nine counts; the 1st, charging the defendant with spreading rumours, with intent to enhance the price of hops, in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops, &c., with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price; 2d, With spreading such rumours generally, with intent to enhance the price of hops; 3d, With endeavouring to enhance the price, by persuading divers dealers, &c. not to take their hops to market, and to abstain from selling for a long time; 4th, With ingrossing large quantities of hops, by buying from many particular persons, by name, certain quantities, with intent to resell the same for an unreasonable profit, and thereby to enhance the price: 5th, *Ad idem*, stating the particular contracts; 6th, With getting into his hands large quantities, by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, and thereby greatly to enhance the price; 7th, With buying like quantities with like intent; 8th, With buying like quantities with intent to resell at exorbitant profit, and thereby greatly to enhance the price; 9th, With unlawfully ingrossing, by buying large quantities with like intent. The defendant was convicted generally upon this information.

permission of the court, though not urged regularly in the form of a motion in arrest of judgment.

Arguments urged for the defendant.

On behalf of the defendant it was contended, that the facts charged against him never constituted any offence, even previous to the statute 12 Geo. III. c. 71.; but that if they did, the offences stated in each count, and all others *ejusdem generis*, were done away by that statute, which went to repeal, not merely the particular acts of parliament therein enumerated, but the whole system of laws respecting forestalling, regrating, and ingrossing. And the resolutions of the committee of the House of Commons, to whom it was referred to make a report upon these laws, were relied upon, as shewing that it was the intention of the legislature to do them away altogether. The defendant's counsel also urged, that an ingrossing must be of some commodity which constitutes *victuals*, and that *hops* were no victuals: and they also took objections to the particular form of the counts of the information; and amongst others, that there was no quantity specified on the face of the information out of which the defendant purchased the hops, whereas this should have appeared, ingrossing being a relative term, and meaning the getting either the whole of any commodity, or at least so much of it as to prevent others from supplying their wants in the common course of trade; and that the quantity ingrossed ought to have been so much as would have affected the consumption of the whole kingdom.

Lord Kenyon's opinion.

Lord Kenyon, in delivering his opinion, said, that it could not be denied, but that our law books declare practices of the sort with which the defendant was charged to be offences at common law; that he was perfectly satisfied that the common law remained in force with respect to offences of this nature; and that in considering whether that was intended to be done away by the act of the 12 Geo. III. he could not regard the resolutions entered on the journals of the Commons house of Parliament, but must look to the statute-book; and that there he found nothing which trenched upon what he had

said, but only a repeal of certain statutes, upon none of which that prosecution was founded, but upon the common law. With respect to the objection that hops were no victuals, he observed, that if they were become a necessary ingredient, though only for preserving the common drink of the people, they must be deemed a necessary of life and a victual, the ingrossing of which, or committing any undue practices to enhance the price to the public, is an offence at common law. (*u*) And as to the objection that the quantity purchased could not constitute the offence of ingrossing unless it bore such a proportion to the consumption of the whole kingdom as would affect the general price, his Lordship said, that the objection was new to him; but that if the opinions of Lord *Mansfield*, Mr. Justice *Dennison*, and Mr. Justice *Foster*, were deserving of attention, there was as little in that objection as in the rest. That he well remembered an information moved for before them against certain persons, for conspiring to monopolize or raise the price of all the salt at *Droitwich:* and that they had no doubt of its constituting an offence, although it was not pretended that these persons had endeavoured to ingross all or any considerable part of the salt in the kingdom.

After referring to the conflict of political opinion upon the subject of these laws, Lord Kenyon proceeded thus: "But without attending to disputed points, let us state "fairly what this case really is, and then see if it be possible

(*u*) It appears that *hops* and *malt* were held not to be within the meaning of the statute 5 and 6 Edw. VI. c. 14. any more than apples, cherries, &c. (1 Hawk. P. C. c. 80. s. 20.) but the statute 9 Ann. c. 12. s. 24. must have altered the law with respect to *hops*, as it prohibited common brewers, under a penalty, from using any other bitter than hops in brewing beer: and the ground on which salt was held to be a victual within the meaning of that statute, was not only because it is necessary of itself for the food and health of man, but also because it seasons and makes wholesome beef, pork, &c. 3 Inst. 195. The monopolizing of salt is clearly an offence at common law. *Vide* Lord Kenyon's judgment in Rex *v.* Waddington, 1 East. R. 157.

"to doubt, whether the defendant has been guilty of any "offence. Here is a person, going into the market, who "deals in a certain commodity. If he went there for the "purpose of making his purchases in the fair course of deal- "ing, with a view of afterwards dispersing the commodity "which he collected, in proportion to the wants and conve- "nience of the public, whatever profit accrues to him from "the transaction, no blame is imputable to him. On the "contrary, if the whole of his conduct shews plainly that "he did not make his purchases in the market with this "view, but that his traffic there was carried on with a view "to enhance the price of the commodity, to deprive the "people of their ordinary subsistence, or else to compel "them to purchase it at an exorbitant price, who can deny "that this is an offence of the greatest magnitude?" (*w*)

Second case against *Waddington.*—*Ingrossing* hops.

The same defendant had been also tried upon an indictment which, in substance, charged him chiefly with *ingrossing* a large quantity of hops in *Kent*, by buying them from various persons, by forehand bargains and otherwise, at a certain price, with intent to resell them at an unreasonable profit, or an exorbitant price. (*x*) It appeared from the

(*w*) Rex *v.* Waddington, Hil. T. 41 Geo. III. 1 East. R. 143.

(*x*) The indictment consisted of ten counts: 1st, For ingrossing hops of divers persons by name, with intent to resell at an unreasonable profit, and thereby enhance the price; 2d, For ingrossing hops, then growing, by forehand bargains, with like intent; 3d, For buying large quantities of hops, of divers persons mentioned, with intent to prevent their being brought to market, and to resell them at an unreasonable profit, and thereby enhance the price; 4th, For buying all the growth of hops in several parishes by forehand bargains, with the like intent; 5th, For buying hops of divers persons, named, with the same intent as in the first count; 6th, For buying all the growth of hops on certain lands in certain parishes, by forehand bargains, with intent to resell at an unreasonable price, and thereby to enhance the price; 7th, For endeavouring to enhance the price of hops by persuading hop-owners not to sell, &c. 8th, For ingrossing, by buying large quantities of persons unknown, with intent to resell at an exorbitant profit; 9th, Buying large quantities with the like in-

report, that the principal part of the evidence related to the forehand bargains made by the defendant, with different planters, for their growing crop of hops; a practice, however, which appeared to have prevailed for a considerable period of time in *Kent*, and without which, some of the witnesses stated, that, in their judgment, the cultivation of this plant, the expence of which was exceedingly heavy, could not be generally carried on. There was also evidence of the defendant's having bought up very large quantities of the commodity to an unusual amount, and by making unusual advances of money; and that he had held out language of inducement to other persons dealing in the same article, to withhold their stock from the market, with a view to a rise in the price. (*y*)

On the part of the defendant, the long existence of the practice of making forehand bargains for hops was insisted upon as affording some argument for their legality; and that at any rate it could not be considered as *ingrossing*, to have made forehand bargains for 258 acres out of 30,000 acres in cultivation, of the same article, in the county of *Kent* alone. But Grose, J. in passing sentence upon the defendant, adverted to what had been said in the former prosecution, and stated that the particular offence of *ingrossing* still remained an offence at common law, and was calculated to create an artificial scarcity where none existed in reality, and to aggravate that calamity where it did exist. (*z*)

An indictment for ingrossing *a great quantity of fish, geese, and ducks*, without specifying the quantity of each, Indictment.

tent; 10th, For buying hops then growing, with intent to resell at an exorbitant price and lucre. The defendant was tried before Lord Kenyon, who thought the evidence sufficient to go to the jury upon all the counts; and the jury found a general verdict against the defendant.

(*y*) This last-mentioned evidence applied to the 7th count; the only one the proof of which was afterwards contested (but without effect) at the bar.

(*z*) Rex *v.* Waddington, Hil. T. 41 Geo. III. 1 East, R. 167.

has been held to be bad. (*a*) And an indictment for ingrossing *magnam quantitatem straminis et fœni* was quashed, for not mentioning how many loads of each. (*b*)

Punishment.

It is said, that by an ancient statute the offender was to be grievously amerced for the first offence; for the second to be condemned to the pillory; for the third to be imprisoned; and for the fourth, to be compelled to abjure the vill. And there seems to be no doubt, but that, at this day, all offenders of this kind are liable to a fine and imprisonment, answerable to the heinousness of their offence, upon an indictment at common law. (*c*)

Of Monopolies.

Monopolies are much the same offence in other branches of trade that ingrossing is in provisions: being a licence or privilege allowed by the king for the sole buying and selling, making, working, or using of any thing whatsoever; whereby the subject in general is restrained from that liberty of manufacturing or trading which he had before. (*d*) They are said to differ only in this; that monopoly is by patent from the king, ingrossing by the act of the subject between party and party; and have been considered as both equally injurious to trades, and the freedom of the subject, and therefore equally restrained by the common law. (*e*) By the common law, therefore, those who are guilty of this offence are subject to fine and imprisonment, the offence being *malum in se*, and contrary to the ancient and fundamental laws of the kingdom; and it is said, that there are precedents of prosecutions of this kind in former days. (*f*) And all grants of this kind, relating to any known trade, are void by the common law. (*g*)

(*a*) Rex *v.* Gilbert, 1 East. R. 583.

(*b*) Anon. Cro. Car. 381. And see 2 Hawk. P. C. c. 25. s. 74. Rex *v.* Gibbs, 1 Str. 497. Rex *v.* Foster, 1 Lord Raym. 475.

(*c*) 1 Hawk. P. C. c. 80. s. 5.

(*d*) 4 Blac. Com. 158. 3 Inst. 181.

(*e*) Skin. 169.

(*f*) 3 Inst. 181. 2 Inst. 47, 61. 4 Bac. Ab. 764. *Monopoly* (A) note (*b*).

(*g*) 1 Hawk. P. C. c. 79. s. 1.

But, notwithstanding their illegality, monopolies had been carried to an enormous height during the reign of queen Elizabeth; the evil was however in a great measure remedied by the statute 21 Jac. I. c. 3. which declares them to be contrary to law, and void; (except as to patents, not exceeding the grant of fourteen years, to the authors of new inventions; and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot;) and monopolists are punished with the forfeiture of treble damages and double costs, to those whom they attempt to disturb. (*h*)

The undue abatement of the price of our native commodities is punishable.

It is worthy of observation, that, as our laws on the one hand carefully protect the people from the arts of those who would unduly raise the price of the comforts and necessaries of life; so, on the other, they protect the fair trader from impositions, which may have the effect of unduly lowering the price of the article in which he deals. Thus, the abatement by undue means of the price of our native commodities is punishable by fine and ransom: (*i*) and a case is mentioned, where certain persons came to *Coteswold*, and said, in deceit of the people, that there were such wars beyond the seas that wool could not pass or be carried beyond sea; whereby the price of wools was abated; and presentment thereof being made, the defendants, having appeared, were, upon their confession, put to fine and ransom. (*k*)

(*h*) S. 4. And see further upon the subject of Monopolies, 1 Hawk. P. C. c. 79. 4 Bac. Ab. *Monopoly*.

(*i*) 3 Inst. 196. referring to 23 Edw. III. c. 6. 13 Rich. II. c. 8. *Inter leges Ethelstani*, c. 12.

(*k*) 3 Inst. 196.

CHAPTER THE TWENTY-FIRST.

Of Maintenance and Champerty, and of Buying and Selling Pretended Titles.

Maintenance.

I. *MAINTENANCE* seems to signify an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. This may be where a person assists another in his pretensions to lands, by taking or holding the possession of them for him by force or subtilty, or where a person stirs up quarrels and suits in relation to matters wherein he is in no way concerned; (*a*) or it may be where a person officiously intermeddles in a suit depending in a court of justice, and in no way belonging to him, by assisting either party with money, or otherwise, in the prosecution or defence of such suit. (*b*) Where there is no contract to have part of the thing in suit, the party so intermeddling is said to be guilty of *maintenance* generally; but if the party stipulate to have part of the thing in suit, his offence is called *champerty*. (*c*)

Instances of maintenance.

As to *maintenance*, it is laid down, that whoever assists another with money to carry on his cause, as by retaining one to be of counsel for him, or otherwise bearing him out

(*a*) Co. Lit. 368. b. 2 Inst. 208, 212, 213. 1 Hawk. P. C. c. 83. s. 1, 2. 4 Bac. Ab. 488. *Maintenance*. This kind of maintenance is called in the books *ruralis*, in distinction to another sort carried on in courts of justice, and therefore called *curialis*. It is punishable at the king's suit by fine and imprisonment, whether the matter in dispute any way depended in plea or not; but is said not to be actionable.

(*b*) 1 Hawk. P. C. c. 83. s. 3. 4 Bac. Ab. 488. *Maintenance*. 4 Blac. Com. 134. This kind of maintenance is called *curialis*. See *ante*, note (*a*).

(*c*) Co. Lit. 368. 1 Hawk. P. C. c. 83. s. 3.

in the whole or part of the expence of the suit, may properly be said to be guilty of an act of maintenance. (*d*) It has been said, that no one can be guilty of maintenance in respect of any money given by him to another for the purposes of an intended suit, *before* any suit is actually commenced; but it should seem that this, if not strictly maintenance, must be equally criminal at common law. (*e*) And a person may be as much guilty of maintenance for supporting another after judgment, as for doing it while the plea is pending, because the party grieved may be thereby discouraged from bringing a writ of error or attaint. (*f*)

It has also been said, that he who by his *friendship* or *interest* saves a person that expence in his cause which he might otherwise be put to, or gives, or but endeavours to give, any other kind of assistance to a party in the management of his suit, is guilty of maintenance. (*g*) And it has

(*d*) 1 Hawk. P. C. c. 83. s. 4. and the numerous authorities cited in the margin.

(*e*) 4 Bac. Ab. 490. *Maintenance*, (A). 1 Hawk. P. C. c. 83. s. 12. where it is said, that if it plainly appear that the money was given merely with a design to assist in the prosecution or defence of an intended suit, which afterwards is actually brought, surely it cannot but be as great a misdemeanor in the nature of the thing, and equally criminal at common law, as if the money were given after the commencement of the suit; though perhaps it may not in strictness come under the notion of maintenance.

(*f*) 1 Hawk. P. C. c. 83. s. 13. 4 Bac. Ab. 490. *Maintenance* (A).

(*g*) Bro. tit. *Maintenance*, 7, 14, 17, &c. 1 Hawk. P. C. c. 83. s. 5, 6. But *qu.* how far this would be acted upon at the present day; and see the judgment of Buller, J. in Master *v.* Miller, 4 T. R. 340. where he says: "It is curious, and not altogether useless, to see how the doctrine of maintenance has from time to time been received in *Westminster Hall*. At one time, not only he who laid out money to assist another in his cause, but he that by his friendship or interest saved him an expence that he would otherwise be put to, was held guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppressed the truth. That such doctrine, repuguant to every ho-

been said also, that he who gives any *public countenance* to another in relation to such suit, will come under the like notion; as if a person of great power and interest says publicly that he will spend a sum of money on one side, or that he will give a sum of money to labour the jury, whether in truth he spend any thing or not; or where such a person comes to the bar with one of the parties, and stands by him while his cause is tried, whether he says any thing or not; for such practices not only tend to discourage the other party from going on with his cause, but also to intimidate juries from doing their duty. (*h*) But it seems that a bare promise to maintain another is not in itself maintenance, unless it be either in respect of the power of the person who makes it, or of the public manner in which it is made. (*i*) And it seems clear, that a man is in no danger of being guilty of an act of maintenance, by giving another friendly advice as to his proper remedy at law, or as to the counsellor or attorney likely to do his business most effectually. (*k*)

When justifiable.

But there are many acts in the nature of maintenance, which become justifiable from the circumstances under which they are done. They may be justifiable, 1. in respect of an interest in the thing in variance; 2. in respect of kindred or affintiy; 3. in respect of other relations, as that of lord and tenant, master and servant; 4. in respect of charity; 5. in respect of the profession of the law.

In respect of an interest in the thing in variance.

It seems clear that not only those who have an actual interest in the thing in variance, as those who have a reversion expectant on an estate-tail, or a lease for life or years, &c. but also those who have a bare contingency of an interest in the lands in question, which possibly may never come *in esse*, and even those who, by the act of God, have

" nest feeling of the human heart, " should be laid aside, must be ex- " pected."

(*h*) 1 Hawk. P. C. c. 83. s. 7. 4 Bac. Ab. 489. *Maintenance* (A).

(*i*) 1 Hawk. P. C. c. 83. s. 8.

(*k*) *Ibid.* s. 9. 4 Bac. Ab. 489. *Maintenance* (A).

the immediate possibility of such an interest, as heirs apparent, or the husbands of such heirs, though it be in the power of others to bar them, may lawfully maintain another in an action concerning such lands: and if a plaintiff in an action of trespass alien the lands, the alienee may produce evidence to prove that the inheritance at the time of the action, was in the plaintiff, because the title is now become his own. (*l*) Also he who is bound to warrant lands may lawfully maintain the tenant in the defence of his title, because he is bound to render other lands to the value of those that shall be evicted. And he who has an equitable interest in lands or goods, or even in a chose in action, as a *cestui que trust*, or a vendee of lands, &c., or an assignee of a bond for a good consideration, may lawfully maintain a suit concerning the thing in which he has such an equity. (*m*) And wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c. by the same title, they may maintain one another in a suit concerning such thing. And a man's-bail may take care to have his appearance recorded; but, as some say, they cannot safely intermeddle further. (*n*)

In respect of kindred or affinity.

Whoever is of kin, or godfather to either of the parties, or related by any kind of affinity still continuing, may lawfully stand by at the bar and counsel him, and pray another to be of counsel for him; but cannot lawfully lay out his money in the cause, unless he be either father, or son, or heir apparent, to the party, or husband of such an heiress. (*o*)

In respect of the relation of lord and tenant, master and servant.

Much of the law relating to the maintenance which a lord may give to his tenant, would hardly be applicable at the present time. It seems to have been the better opi-

(*l*) 4 Bac. Abr. 490, *Maintenance* (B). 1 Hawk. P. C. c. 83. s. 14, 15, &c.

(*m*) *Id. Ibid.* and see the judgment of Buller, J. in Master *v.* Miller, 4 T. R. 340, *et sequ.*

(*n*) 1 Hawk. P. C. c. 83. s. 24, 25. 4 Bac. Abr. 490. *Maintenance* (B).

(*o*) 4 Bac. Abr. 491. 1 Hawk. P. C. c. 83. s. 26.

nion that the lord might justify laying out his own money in defence of his tenant's title, where the lands were originally derived from the lord, but that he could not maintain the tenant in respect of lands not holden of himself. (*p*)

With respect to the maintenance which a master may give to his servant, it has been held that he may go along with him, or his domestic chaplain, to retain counsel; also he may pray one to be of counsel for him, and may go with him, and stand with him, and aid him at the trial, but ought not to speak in court in favour of his cause: also it is said, that if the servant be arrested, the master may assist him with money to keep him from prison, that he may have the benefit of his service; but he cannot safely lay out money for the servant in a real action, unless he have some of his wages in his hands; but those with the servant's consent he may safely disburse. (*q*) And a servant cannot lawfully lay out any of his own money to assist the master in his suit. (*r*)

In respect of charity.

Any one may lawfully give money to a poor man to enable him to carry on his suit: and any one may safely go with a foreigner, who cannot speak English, to a counsellor and inform him of his case. (*s*)

In respect of the profession of the law.

A *counsellor*, having received his fee, may lawfully set forth his client's cause to the best advantage; but can no more justify giving him money to maintain his suit, or threatening a juror, than any other person. An *attorney* also, when specially retained, may lawfully prosecute or defend an action, and lay out his own money in the suit: but an attorney who maintains another is not justified by a

(*p*) 1 Hawk. P. C. c. 83. s. 29.

(*q*) Bro. *Maint.* 44, 52. 1 Hawk. P. C. c. 83. s. 31, 32, 33.

(*r*) 1 Hawk. *id.* s. 34.

(*s*) Bro. *Maint.* 14. 4 Bac. Abr. 491. *Maintenance* (B) 4. 1 Hawk. P. C. c. 83. s. 36, 37.

general retainer to prosecute for him in all causes. Nor can an attorney lawfully carry on a cause for another at his own expence, with a promise never to expect repayment; and it is said to be questionable whether solicitors, who are no attornies, can, in any case, lawfully lay out their own money in another's case. (*t*)

But no counsellor or attorney can justify using any deceitful practice in maintenance of a client's cause, and they will be liable to be punished for misdemeanors in this respect by the common law, and also by the statute Westm. 1. c. 29. (*u*) In the construction of this statute it has been holden that all fraud and falsehood, tending to impose upon or abuse the justice of the king's courts are within the purview of it; as if an attorney sue out an *habere facias seisinam*, falsely reciting a recovery where there was none, and by colour thereof put the supposed tenant in the action out of his freehold. Also it is an offence within the statute to bring a *præcipe* against a poor man having nothing in the land, on purpose to oust the true tenant, or to procure an attorney to appear for a man, and confess a judgment without any warrant; or to plead a false plea, known to be utterly groundless, and invented merely to delay justice and to abuse the court. (*x*) In most of these cases the court would probably grant an attachment against the offender on motion. (*y*)

II. *Champerty* is a species of maintenance, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; whereupon the champertor is to carry on the Champerty.

(*t*) 2 Inst. 564. 4 Bac. Abr. 491, 492. *Maintenance* (B) 5. 1 Hawk. P. C. c. 83. s. 28, 29, 30.

(*u*) 2 Inst. 215. Bac. Abr. and Hawk. *id. ibid.* The statute enacts that the offender shall be imprisoned for a year and a day, and shall not plead again if he be a pleader.

(*x*) 2 Inst. 215. Dy. 362. 1 Hawk. P. C. c. 83. s. 33, *et sequ.*

(*y*) 4 Bac. Abr. 492, *Maintenance* in the margin.

party's suit at his own expence. (z) Little is to be met with in modern books upon this subject; but the statutes, and resolutions upon their construction, may be shortly noticed.

Westm. 1. c. 25. No officer, &c. shall maintain pleas for lands, &c. to have part thereof.

The statute *Westminster* 1. (3 Edw. I.) c. 25. enacts, that "no officers of the king, by themselves, nor by others, "shall maintain pleas, suits, or matters, hanging in the "king's courts, for lands, tenements, or other things, for to "have part or profit thereof, by covenant made between "them; and he that doth shall be punished at the king's "pleasure." By the courts mentioned in this statute it has been held that courts of record only are intended; and it has also been held that under the word covenant all kinds of promises and contracts of this kind are included; that maintenance in personal actions to have part of the debt or damages, is as much within the statute as maintenance in real actions for a part of the land; and that though a grant of rent out of other lands is not within the statute, yet the statute applies to a grant of rent out of the lands in question; but that a grant of part of a thing in suit, made in consideration of a precedent debt, is not within its meaning. (a) The maintenance of a tenant or defendant is as much within the meaning of the statute as the maintenance of a demandant or plaintiff. And it has been holden not to be material whether he who brings a writ of champerty did in truth suffer any damage by it, or whether the plea wherein it is alleged be determined or not. (b)

Westm. 2. c. 49. Certain officers not to receive any church, land, &c. so long as the thing is in plea.

The statute *Westminster* 2. (13 Edw. I.) c. 49. enacts, that "the chancellor, treasurer, justices, nor any of the king's "council, no clerk of the chancery, nor of the exchequer, "nor of any justice or other officer, nor any of the king's "house, clerk ne lay, shall not receive any church, nor

(z) 4 Blac. Com. 135. 1 Bac. Ab. *Champerty*, p. 574.

(a) See the authorities collected in 1 Hawk. P. C. c. 84. s. 3. *et seqq.*

(b) *Id. Ibid.*

" advowson of a church, land, nor tenement in fee, by gift, " nor by purchase, nor to farm, nor by champerty, nor " otherwise, so long as the thing is in plea before us, or " before any of our officers; nor shall take no reward " thereof. And he that doth contrary to this act, either " himself or by another, or make any bargain, shall be " punished at the king's pleasure, as well he that pur- " chaseth as he that doth sell." This statute extends only to the officers therein named, and not to any other persons. (*c*) But it so strictly restrains all such officers from purchasing any land, pending a plea, that they cannot be excused by a consideration of kindred or affinity, and that they are within the meaning of the statute by barely making such a purchase, whether they maintain the party in his suit or not; whereas such a purchase for good consideration made by any other person, of any terre-tenant, is no offence, unless it appear that he did it to maintain the party. (*d*)

Extended by 28 Edw. I. c. 11.

The statute 28 Edw. I. c. 11. reciting that the king had theretofore ordained by statute that none of his ministers should take no plea for maintenance, by which statute other officers were not bounden, enacts, that " the king will that " no officer, nor any other (for to have part of the thing in " plea) shall not take upon him the business that is in suit; " nor none upon any such covenant shall give up his right " to another; and if any do, and he be attainted thereof, " the taker shall forfeit unto the king so much of his lands " and goods as doth amount to the value of the part that " he hath purchased for such maintenance. And for this " atteindre, whosoever will, shall be received to sue for the " king before the justices before whom the plea hangeth, " and the judgment shall be given by them. But it may " not be understood hereby, that any person shall be pro- " hibit to have counsel of pleaders, or of learned men in " the law for his fee, or of his parents or next friends."

(*c*) 2 Inst. 484, 485.

(*d*) 1 Hawk. P. C. c. 84. s. 12.

Upon this statute it seems to be agreed that champerty in any action at law is within it; and a purchase of land, pending a suit in equity concerning it, has also been holden to be within the statute; also a lease for life or years, or a voluntary gift of land, pending a plea, is as much within the statute as a purchase for money. But neither a conveyance executed, pending a plea, in pursuance of a precedent bargain, nor any surrender by a lessee to his lessor, nor any conveyance or promise thereof made by a father to his son, or by any ancestor to his heir apparent, nor a gift of land in suit, after the end of it, to a counsellor for his fee or wages, without any kind of precedent bargain relating to such gift, are within the meaning of the statute. (*e*)

Of buying or selling a pretended title.

III. Another species of maintenance appears to be the offence of *buying or selling a pretended title*; of which it is said in the books that it seems to be an high offence at common law, as plainly tending to oppression, for a man to buy or sell at an under rate a doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit, which the seller does not think it worth his while to do. And it seems not to be material whether the title be good or bad; or whether the seller were in possession or not, unless the possession were lawful and uncontested. (*f*) Offences of this kind are also restrained by several statutes. The 1 Rich. II. c. 9. enacts, that no gift or feoffment of lands or goods in debate under legal proceedings, as mentioned in the statute, shall be made; and that if made they shall be holden for none and of no value. (*g*) And by the

(*e*) 1 Bac. Abr. *Champerty*, p. 576. 1 Hawk. P. C. c. 84. s. 14. *et sequ.* But with respect to the counsellor it is said that it seems dangerous for him to meddle with any such gift, since it cannot but carry with it a strong presumption of champerty. 2 Inst. 564.

(*f*) 4 Bac. Abr. *Maintenance*, (E) p. 494. 1 Hawk. P. C. c. 86. s. 1. Moore 751. Hob. 115. Plowd. 80.

(*g*) But as between the feoffor and feoffee, feoffments of this kind are effectual. Co. Lit. 369.

13 Edw. I. c. 49. no person of the king's house shall buy any title whilst the thing is in dispute, on pain of both the buyer and seller being punished at the king's pleasure. There is also a provision of the statute 32 Hen. VIII. c. 9. that no one shall buy or sell or obtain any pretended right or title to land unless the seller, his ancestors, or they by whom he claims, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits for one whole year before; on pain that both seller and buyer shall each forfeit the value of such land, the one half to the king, and the other to him who will sue. (*h*)

Place of trial for champerty and buying of titles.

The offences of champerty and buying of titles, laid or alleged in any declaration or information, may be laid in any county, at the pleasure of the informer. (*i*)

Punishment of maintenance by common law.

By the common law all unlawful maintainers are not only liable to render damages in an action at the suit of the party grieved, but may also be indicted and fined, and imprisoned, &c. and it seems that a court of record may commit a man for an act of maintenance in the face of the court. (*k*)

By statute.

Some pains and penalties are also attached to this offence by statute. The 1 Rich. II. c. 4. enacts, that no person whatsoever shall take or sustain any quarrel by maintenance in the country or elsewhere, on grievous pain; that is to say, the king's counsellors and great officers, on a pain that

(*h*) But the statute provides that any person being in lawful possession by taking the rents and profits, may buy or get the pretended right or title of any other person to the same. And it also provides, that no person shall be charged with these penalties unless sued within a year after the offence. For the construction of this statute, see 1 Hawk. P. C. c. 86. s. 7. *et sequ.*

(*i*) 31 Eliz. c. 5. s. 4. 1 Hawk. P. C. c. 84. s. 20. and c. 86. s. 18.

(*k*) 2 Roll. Abr. 114. 2 Inst. 208. Hetl. 79. 1 Hawk. P. C. c. 83. s. 38. 4 Bac. Abr. *Maintenance*, (C) p. 492.

shall be ordained by the king himself, by the advice of the lords of this realm; and other officers of the king, on pain to lose their offices and to be imprisoned and ransomed, &c. and all other persons, on pain of imprisonment and ransom. And by the 32 Hen. VIII. c. 9. maintenance is subjected to a forfeiture of ten pounds: one moiety to the king, and the other moiety to the informer. (*l*)

(*l*) For the construction of these statutes, see 1 Hawk. P. C. c. 83, s. 40. *et sequ.*

CHAPTER THE TWENTY-SECOND.

Of Embracery, and dissuading a Witness from giving Evidence.

Embracery.—Corrupting or influencing jurors.

EMBRACERY is another species of maintenance, and consists in such practices as tend to affect the administration of justice by improperly working upon the minds of jurors. It seems clear that any attempt whatsoever to corrupt or influence, or instruct a jury in the cause beforehand, or any way to incline them to be more favorable to the one side than to the other by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery, whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false. (*a*) And it has been adjudged that the bare giving of money to another, to be distributed among jurors, is an offence of the nature of embracery, whether any of it be afterwards actually so distributed or not. It is also clear that it is as criminal in a juror as in any other person to endeavour to prevail with his companions to give a verdict for one side by any practices whatsoever, except only by arguments from the evidence which may have been produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as where persons by indirect means procure themselves or others to be sworn on a *tales* in order to serve one side. (*b*)

(*a*) 1 Hawk. P. C. c. 85. s. 1. 5. 4 Blac. Com. 140.

(*b*) 1 Hawk. P. C. c. 85. s. 4. The King *v.* Opie and others, 1 Saund. 301.

It is said that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savouring of the nature of embracery: but this does not apply to the reasonable recompence usually allowed to jurors for their expences in travelling. (*c*)

How far justifiable.

The law will not suffer a mere stranger so much as to labour a juror to appear, and act according to his conscience; but it seems clear that a person who may justify any other act of maintenance, (*d*) may safely labour a juror to appear and give a verdict according to his conscience; but that no other person can justify intermeddling so far. And no one whatsoever can justify the labouring a juror not to appear. (*e*)

Punishment of embracery.

Offences of this kind subject the offender to be indicted and punished by fine and imprisonment in the same manner as all other kinds of unlawful maintenance do by the common law. (*f*) They are also restrained by statute, the 5 Edw. III. c. 10. enacting that any juror taking of the one party or the other, and being duly attainted, shall not be put in any assizes, juries, or inquests; and shall be commanded to prison, and further ransomed at the king's will: and the 34 Edw. III. c. 8. enacting that a juror attainted of such offence shall be imprisoned for a year. A subsequent statute 38 Edw. III. c. 12. enacts that if any jurors, sworn in assizes and other inquests, take any thing, and be thereof attainted, every such juror shall pay ten times as much as he hath taken. "And that all the embraceors to bring or "procure such inquest in the country, to take gain or pro- "fit, shall be punished in the same manner and form as the "jurors; and if the juror or embraceor so attainted have "not whereof to make gree in the manner aforesaid, he "shall have the imprisonment of one year." (*g*) The sta-

(*c*) 1 Hawk. P. C. c. 85. s. 3.
(*d*) *Ante*, 268, *et sequ.*
(*e*) 1 Hawk. P. C. c. 85. s. 6.
(*f*) *Id.* s. 7. 4 Bl. Com. 140.
(*g*) Upon the construction of these statutes, and respecting the action of *decies tantum*, see 1 Hawk. P. C. c. 85. s. 11. *et sequ.* And see

tute 32 Hen. VIII. c. 9. also enacts that no person shall embrace any freeholders or jurors upon pain of forfeiting £10, half to the king, and half to him that shall sue within a year.

Dissuading a witness from giving evidence.

All who endeavour to stifle the truth, and prevent the due execution of justice, are highly punishable; and therefore the dissuading or endeavouring to dissuade a witness from giving evidence against a person indicted is an offence at common law, though the persuasion should not succeed. (*h*)

also 32 Hen. VIII. c. 9. which enacts that all statutes theretofore made concerning maintenance, champerty, and embracery, or any of them, then standing and being in their full strength and force, shall be put in due execution.

(*h*) 1 Hawk. P. C. c. 21. s. 15. Rex *v.* Lawley, 2 Str. 904. See as to mere *attempts* to commit crimes, *ante*, p. 61, 62. And see an indictment for dissuading a witness from giving evidence against a person indicted, 2 Chit. Crim. L. 235: and an indictment for a conspiracy to prevent a witness from giving evidence, Rex *v.* Steventon and others, 2 East. R. 362.

CHAPTER THE TWENTY-THIRD.

Of Barratry, and of Suing in the name of a Fictitious Plaintiff.

Definition of barratry.

A BARRATOR is defined to be a common mover, exciter, or maintainer, of suits or quarrels in courts of record, or other courts, as the county court, and the like; or in the country, by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumours and calumnies whereby discord and disquiet may grow among neighbours. (*a*)

What persons may commit the offence.

But one act of this description will not make any one a barrator, as it is necessary in an indictment for this offence to charge the defendant with being *a common barrator*, which is a term of art appropriated by law to this crime. (*b*) It has been holden, that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right: (*c*) but this is doubted, in case such actions be merely groundless and vexatious, without any manner of colour, and brought only with a design to oppress the defendants. (*d*)

An attorney cannot be deemed a barrator in respect of his maintaining another in a groundless action, to the com-

(*a*) Rex *v.* Urlyn, 2 Saund. 308, note (1). 1 Hawk. P. C. c. 81. s. 1, 2. Co. Lit. 368. 8 Rep. 36. Barrator is said to be a forensic term taken from the Normans. The Islandic and Scandinavian *baratta*, the Anglo-Norman *baret*, and the Italian *baratta*, are all words signifying a quarrel or contention. See the notes to 1 Bac. Abr. 508, *Barratry* (A).

(*b*) 8 Co. 36. Rex *v.* Hardwicke, 1 Sid. 282. Reg. *v.* Hannon, 6 Mod. 311.

(*c*) Roll. Abr. 355.

(*d*) 1 Hawk. P. C. c. 81. s. 3.

mencing whereof he was no way privy. (*e*) And it seems to have been holden that a *feme covert* cannot be indicted as a common barrator: (*f*) but this opinion is considered as questionable. (*g*)

Indictment and proceedings.

In an indictment for this offence it seems to be unnecessary to allege it to have been committed at any certain place; because, from the nature of the crime, consisting in the repetition of several acts, it must be intended to have happened in several places; wherefore it is said that the trial ought to be by a jury from the body of the county. (*h*) As the indictment may be in a general form, stating the defendant to be a common barrator, without shewing any particular facts, it is clearly settled that the prosecutor must, before the trial, give the defendant a note of the *particular acts* of barratry which he intends to prove against him; and that if he omit to do so, the court will not suffer him to proceed in the trial of the indictment. (*i*) And the prosecutor will be confined to his note of particulars; and will not be at liberty to give evidence of any other acts of barratry than those which are therein stated. (*k*)

Trial may be before justices of the peace.

It has been adjudged that justices of peace, *as such*, have, by virtue of the commission of the peace, authority to inquire and hear this offence, without any special commission of oyer and terminer. (*l*)

(*e*) 1 Hawk. P. C. c. 81. s. 4.

(*f*) 1 Bac. Abr. *Baron and Feme* (G) in the notes, citing Roll. Rep. 39.

(*g*) 1 Hawk. P. C. c. 81. s. 6.

(*h*) Parcel's case, Cro. Eliz. 195. 1 Hawk. P. C. c. 81. s. 11. 1 Bac. Abr. 509, *Barratry* (B).

(*i*) Rex *v.* Grove, 5 Mod. 18. J'Anson *v.* Stuart, 1 T. R. per Buller, J.

(*k*) Goddard *v.* Smith, 6 Mod. 262.

(*l*) Barnes *v.* Constantine, Yelv. 46. Cro. Jac. 32. S. C. recognized in Busby *v.* Watson, 2 Blac. R. 1050. See Rex *v.* Urlyn, 2 Saund. 308 note (1). In Hawk. P. C. c. 81. s. 8. there is a *quære* to this point, as having been ruled differently in Rolle's Reports.

Punishment.

The punishment for this offence in common persons is by fine and imprisonment, and binding them to their good behaviour; and in persons of any profession relating to the law, a further punishment by being disabled to practise for the future. (*m*) And it may be observed that by 12 Geo. I. c. 29. s. 4. if any person convicted of common barratry shall practise as an atttorney, solicitor, or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought, shall upon complaint or information examine the matter in a summary way in open court; and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. (*n*)

Of suing in the name of a fictitious plaintiff.

In this place may be mentioned another offence of equal malignity and audaciousness; that of suing another in the name of a fictitious plaintiff; either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion: but in courts of a lower degree, where the crime is equally pernicious, but the authority of the judges not equally extensive, it is directed by the statute 8 Eliz. c. 2. s. 4. to be punished by six months imprisonment, and treble damages to the party injured. (*o*)

(*m*) 34 Edw. III. c. 1. 1 Hawk. P. C. c. 81. s. 14. 1 Bac. Abr. 509, *Barratry* (C) 4 Blac. Com. 134.

(*n*) This act was revived and made perpetual by 21 Geo. II. c. 3.

(*o*) 4 Blac. Com. 134.

CHAPTER THE TWENTY-FOURTH.

Of Bigamy.

THE offence of having a plurality of wives at the same time, is more correctly denominated *polygamy*: but the name *bigamy* having been more frequently given to it in legal proceedings, it may perhaps be a means of more ready reference to treat of the offence under the latter title. (*a*) Originally this offence was considered as of ecclesiastical cognizance only; and though the statute 4 Ed. I. stat. 3. c. 5. treated it as a capital crime, (*b*) it appears still to have been left of doubtful temporal cognizance, until the statute 1 Jac. I. c. 11. declared that such offence should be felony.

2 (vulgo 1) Jac. I. c. 11. Bigamy made felony.

The first section of this statute, after reciting the mischiefs of the offence, enacts, "that if any person or persons "within his Majesty's dominions of *England* and *Wales*, "being married, or which hereafter shall marry, do marry

(*a*) Bigamy, in its proper signification, is said to mean only being twice married, and not having a plurality of wives at once. According to the canonists, bigamy consisted in marrying two virgins successively, one after the death of the other; or in once marrying a widow. 4 Blac. Com. 163. note *b*. And see 1 Bac. Abr. 525. *Bigamy* in the notes.

(*b*) This statute adopted and explained a canon of the council of *Lyons* in 1274, in the time of Pope Gregory X. by which persons guilty of bigamy were *omni privilegio clericali nudati et coercioni fori secularis addicti*. But the cognizance of the plea of bigamy was declared by statute 18 Edw. III. st. 3. c. 2. to belong to the court Christian, like that of bastardy. And by 1 Edw. VI. c. 12. s. 16. bigamy was declared to be no impediment to the claim of clergy, as it had been taken to be in consequence of the statute 4 Edw. I. st. 3. c. 5. See note b. to p. 163. of 4 Blac. Com. (13*th Ed.*)

" any person or persons, the former husband or wife being " alive; that then every such offence shall be felony, and " the person and persons so offending shall suffer death, as " in cases of felony; and the party and parties so offending " shall receive such and the like proceeding, trial, and exe- " cution, in such county where such person or persons shall " be apprehended, as if the offence had been committed in " such county where such person or persons shall be taken " or apprehended."

S. 2. makes an exception where the husband or wife shall be absent for seven years.

By the second section it is provided, " that this act, nor " any thing therein contained, shall extend to any person or " persons whose husband or wife shall be continually re- " maining beyond the seas by the space of seven years toge- " ther; or whose husband or wife shall absent him or herself, " the one from the other, by the space of seven years toge- " ther, in any parts within his Majesty's dominions, the one " of them not knowing the other to be living within that " time."

S. 3. excepts from the statute persons divorced, those whose former marriage has been declared void, and those married within age of consent.

And the third section provides, " that this act, nor any " thing herein contained, shall extend to any person or per- " sons that are or shall be at the time of such marriage " divorced by any sentence in the ecclesiastical court; or to " any person or persons where the former marriage shall " be by sentence in the ecclesiastical court declared to be " void and of no effect; nor to any person or persons for or " by reason of any former marriage had or made within " age of consent." (*c*)

Construction of the statute.

In the construction of this statute it has been holden, that if a woman marries a husband in *Ireland*, and afterwards, such husband still living, marries another husband in *England*, it is within the act. But that if she marries a husband in *England*, and afterwards, such husband still living, mar-

(*c*) There is a fourth section, providing that attainder shall not make corruption of blood, loss of dower, or disinherison of heirs.

ries another husband in *Ireland*, it is not within the act: on the ground that the second marriage, which alone constitutes the offence, is a fact done within another jurisdiction; and though inquirable here for some purposes, like all transitory acts, is not cognizable as a crime by the rule of the common law. (*d*) In another case it was ruled, that if A. takes B. to husband in *Holland*, and then, in *Holland*, takes C. to husband living B. and then B. dies, and then A. living C. marries D. this is not marrying a second husband the former being alive; the marriage to C. living B. being simply void. But if B. had been living, it would have been felony to have married D. in England. (*e*)

Construction of the exceptions in the statute.

The provisoes in the second and third sections of the statute contain exceptions in respect of five cases in which a second marriage is no felony within the statute. The *first exception* is that the statute shall not extend "to any "person or persons whose husband or wife shall be con- "tinually remaining beyond the seas by the space of seven

First exception where husband or wife shall be

(*d*) 1 Hale 692, 693. 1 East. P. C. c. 12. s. 2. p. 465. Hawkins (B. I. c. 44. s. 7.) doubts as to the last point, and refers to the words in the latter part of section 1. of the statute "that the parties so "offending shall receive such or "the like proceeding, &c. in such "county where such person or "persons shall be apprehended, "*as if the offence had been com-* "*mitted in such county* where such "person or persons shall be taken "or apprehended." But upon this Mr. East says, "I cannot think "that this provision, which is to "be found in other statutes, (vide "the Black Act, and 10 and 11 "W. III. c. 25. for trial in any "county here of murder, &c. com- "mitted in Newfoundland) is sufficient to take this case out of "the general rule. The question "must still be, whether, without a "positive enactment for that purpose, any act be cognizable as "an offence against the law of "England, which was committed "out of the jurisdiction of that "law. Besides that the very words "of the enacting clause in grammatical construction confine the "operation of it to persons who "being married, shall, within *England and Wales*, marry any "other." The same doubt, however, appears in Kel. 80.

(*e*) Lady Madison's case, 1 Hale 693.

beyond the seas for seven years.

Second exception where husband or wife shall be absent for seven years and not known to be living.

"years together;" upon which the construction has been that it will apply though the party in England have notice that the other is living. (*f*) The *second exception* is that it shall not extend to any person "whose husband or wife "shall absent him or herself, the one from the other, by the "space of seven years together, in any parts within his Ma- "jesty's dominions, the one of them not knowing the other "to be living within that time." Here by the express words of the clause, the party marrying again must have no knowledge of the former husband or wife being alive. But the obligation of a party to use reasonable diligence to inform himself of the fact, and the question whether if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are points which do not appear to be settled. (*g*) With respect to the words in this second clause "within his Majesty's dominions," Lord Hale says that they must, *in favorem vitæ*, be intended to mean within *England*, *Wales*, or *Scotland*, in order to make both clauses consistent. (*h*)

Third exception--Divorce.

The *third exception* provides that the act shall not extend "to any person "or persons that are, or shall be at the time of such mar- "riage, divorced by any sentence in the ecclesiastical court;" upon which it has been held, in respect of the generality of the words, that the clause applies as well to a divorce à mensâ et thoro, as to a divorce à vinculo matrimonii: and, though in one case much doubted, (*i*) the point appears to be so settled. (*k*) And if there be a divorce à vinculo

(*f*) 1 Hale 693. 3 Inst. 88. 4 Blac. Com. 164. This is remarked upon as an extraordinary provision in 1 East. P. C. c. 12. s. 3. p. 466.

(*g*) See 1 East. P. C. c. 12. s. 4. p. 467. where Mr. East says that they are questions which he does not find any where touched upon; but which seem worthy of mature consideration.

(*h*) 1 Hale 693. where he says also "however the isle of *Wight* "is not beyond the sea within the "first clause, because *infra corpus comitatus Southampton*: so "for *Scilly*, *Lundy*. *Quære* of "Guernsey, and Jersey."

(*i*) Porter's case, Cro. Car. 461. where the divorce was *causa sævitiæ*.

(*k*) 1 Hale 694. 3 Inst. 89. 1 Hawk. P. C. c. 42. s. 5. 4 Blac. Com. 164. Middleton's case, Old Bailey, 14 Car. II. Kel. 27. And

matrimonii and an appeal by one of the parties, though this suspends the sentence, and may possibly repeal it, yet a marriage pending that appeal will be aided by this exception. (*l*) In a late case the question arose, whether a divorce by the commissary or consistorial court of Scotland would operate so as to excuse a person who, having been married in England, had been divorced by that court, and had then married again in England, from the penalties of bigamy. On the part of the prosecution, it was proved that the prisoner was an Englishman, that the first and second marriages were solemnized at Liverpool, and that the first wife was living at the time of the second marriage: the prisoner's defence was, that before the time of his second marriage a divorce had been sued for and obtained in Scotland by his first wife on the ground of adultery. The point was reserved for the consideration of the judges, who decided that the divorce in question did not protect the prisoner; and they were unanimously of opinion, that a marriage solemnized in England was indissoluble by any thing except an act of the legislature. (*m*) The *fourth exception* is that the act shall not extend "to any person or persons where the former marriage

Fourth exception--Sentence in the ecclesiastical court.

see 1 East. P. C. c. 12. s. 5. p. 467. where it is said that this construction prevails, though it must be admitted to be entirely beside the reason and justice of the exception; letting in the very mischief intended to be provided against by the statute.

(*l*) 3 Inst. 89. 1 Hale 694, citing Co. P. C. cap. 27. p. 89. and stating further that if the sentence of divorce be repealed, a marriage afterwards is not aided by the exception, though there was once a divorce.

(*m*) Lolly's case, *cor.* Wood, B. *Lancaster* Sum. Ass. 1812. The jury, under his Lordship's direction, found the prisoner guilty; but the question was reserved for the opinion of the twelve judges, and was argued before them in the Michaelmas term following. Their opinion has not been formally declared; but it is referred to by the Lord Chancellor, and also by Mr. Brougham, in Tovey *v.* Lindsay, 1 Dow's Rep. 117. The prisoner was sentenced at the *Lancaster* Spr. Ass. 1813 to be transported for seven years; and he was sent on board the Portland hulk at Langtone harbour, where he continued some time; but it is understood he received a pardon before any considerable portion of his sentence

" shall be, by sentence in the ecclesiastical court, declared to " be void and of no effect." But it was resolved by all the judges that a sentence of the spiritual court against a marriage in a suit of jactitation of marriage, is not conclusive evidence, so as to stop the counsel for the crown from proving the marriage; the sentence having decided on the invalidity of the marriage only collaterally and not directly. And further, admitting such sentence to be conclusive, yet that the counsel for the crown may avoid the effect of such sentence, by proving it to have been obtained by fraud or collusion. (*n*)

Fifth exception where former marriage was had within the age of consent.

The *fifth exception* provides that the act shall not extend " to any person or persons for or by rea- " son of any former marriage had or made within the age " of consent." This age of consent is fourteen years in a man, and twelve years in a woman; (*o*) and the construction upon the clause has been, that if either of the parties were within such age at the time of the first marriage, not only the one within the age, but the other also who was above it, is entitled to the benefit of the exception. (*p*) But in a case of this kind, it seems that if the parties afterwards, when at the age of consent, agree to the marriage, as such agreement would complete the contract, and would indeed be the real marriage, a second marriage would be within the reason and penalties of the act. (*q*)

was expired. Upon the important subject of the dissolution of marriages, celebrated under the English law, by the consistorial court of Scotland, see a publication of Reports of some recent Decisions of that Court, by James Fergusson, Esq. Advocate, one of the judges.

(*n*) Duchess of Kingston's case, Dom. Proc. 16 Geo. III. 11 St. Tri. 262. 1 Leach 146. 1 Hawk. P. C. c. 42. s. 11.

(*o*) 1 Blac. Com. 436.

(*p*) 3 Inst. 89. 1 Hale 694. 1 Hawk. P. C. c. 42. s. 6. The reason given is that the power of disagreeing to such marriage is equal on both sides. But in a civil light a promise of marriage by an adult to one under age will subject the adult to an action for a breach of such promise. Holt *v.* Ward, Tr. 5 Geo. II. cited 1 East. P. C. c. 12. s. 6. p. 468.

(*q*) 4 Blac. Com. 164. 1 East. P. C. c. 12. s. 6. p. 468.

It may be observed that if a person marrying again come within any of the three first of these exceptions, though the second marriage is not felony, yet, as before the statute, it is null and void, and the parties will be subject to the censures and punishment of the ecclesiastical courts. (*r*)

Proceedings upon the statute.

It is directed by the statute that parties offending against it "shall receive such and the like proceeding, trial, and "execution, in such county where such person or persons "shall be apprehended, as if the offence had been committed "in such county where such person or persons shall be "taken or apprehended." This clause has been held to mean the place where the party is imprisoned; (*s*) and as it appears from the record itself that he is brought to the bar in the custody of the sheriff, it is doubted whether it is necessary to aver in the indictment that the party was apprehended in the county where the venue is laid. (*t*) But the provision of the statute is only cumulative, and the party may be indicted where the second marriage was,

(*r*) 4 Blac. Com. 164 note (3).

(*s*) Lord Digby's case, Hutt. 131.

(*t*) Starkie Crim. Pl. 412. note (*b*). 2 Chit. Crim. L. 719. notes. But in 1 East. P. C. c. 12. s. 8. p. 469. it is said that where the trial is in the county where the party was apprehended there is an averment in the indictment of that fact. And in a case at the Old Bailey, in 1798, the court is stated to have held, (upon an objection taken by the prisoner's counsel,) that as the *warrant* for the prisoner's apprehension had not been produced, and as it had not been proved that the prisoner was apprehended in the county of Middlesex, they had no jurisdiction to try him. Forsyth's case, 2 Leach 826. It seems, however, to be well established that where the jurisdiction of the court depends upon particular circumstances, exclusive of the offence itself, it is frequently unnecessary to aver them upon the face of the indictment. Thus though the common commission of gaol delivery extends only to prisoners in actual custody, it need not be averred in the indictment that the defendant was then in prison. And where the crown issues a commission to try certain persons in custody before a particular day, the indictment need not allege that the defendant was in custody before that day. See Starkie 27, 28. citing Berwick's case. Fost. 10. 12 Mod. 449.

though he be never apprehended, and so may be outlawed; for in general where a statute creating a new felony directs that the offender may be tried in the county in which he is apprehended, but contains no negative words, he may be tried in that county in which the offence was committed. (*u*)

Of the evidence.—As to the first marriage.

A first marriage *de facto*, subsisting in fact at the time of the second marriage, is sufficient to bring a case within the act, though such first marriage be voidable by reason of consanguinity, affinity, or the like; for it is a marriage in judgment of law until it is avoided. (*w*) But it has been ruled that though a lawful canonical marriage need not be proved, yet a marriage in fact (whether regular or not) must be shewn; (*x*) which it seems must be understood where there is primâ facie evidence of a lawful marriage. (*y*) In a case where the first marriage, which was with a Roman Catholic woman, was by a Romish priest in England, not according to the ritual of the church of England, and the ceremony was performed in Latin, which the witnesses did not understand, and could not therefore swear that the ceremony of marriage according to the church of Rome was read; it was directed that the defendant should be acquitted. (*z*) Willes, C. J. who tried him seemed to be of opinion that a marriage by a priest of the church of Rome was a good marriage, (*a*) if the ceremony according to that church could be proved, namely, the words of the contracting part of it.

Marriage act, 26 G. II. c. 33.

The general provision of the *marriage act*, 26 Geo. II.

(*u*) 1 Hale 694. 3 Inst. 87. Starkie 11.

(*w*) 3 Inst. 88.

(*x*) By Denison J. on the *Norfolk* circuit, referred to by the court in Morris *v.* Miller, 1 Blac. R. 632.

(*y*) Rex *v.* Brampton, 10 East. 287. note (b).

(*z*) Lyon's case, Old Bailey, 1738. 1 East. P. C. c. 12. s. 10. p. 469. citing serjeant Forster's MS.

(*a*) To this Mr. East (*id. ibid.*) subjoins a quære, and says that it must at least be understood of the marriage of persons of that communion.

c. 33. requires all marriages to be by banns or licence: and by the eighth section it is declared that all marriages solemnized in any other place than a church or public chapel (unless by special licence) or that shall be solemnized without publication of banns or licence first had and obtained, shall be null and void to all intents and purposes whatsoever. But the act does not extend to Scotland, nor to marriages amongst Quakers or Jews where both parties are Quakers or Jews; nor to marriages solemnized beyond the seas. (*b*)

S. 1. As to the publication of banns.

The first section of that act provides that all *banns* of matrimony shall be published in the parish church, or in some public chapel, in which banns of matrimony have been usually published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell upon three Sundays preceding the solemnization of marriage: and if the persons to be married dwell in different parishes the banns are to be published in the church or chapel of the parish or chapelry in which each shall dwell; and where both or either dwell in an extra-parochial place (having no church or chapel wherein banns have been usually published), then the banns are to be published in the parish church or chapel adjoining; and also that in all cases where banns shall have been published the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place whatsoever.

S. 11. As to marriages by licence, and consent of parents or guardians.

The eleventh section of the act provides that all marriages solemnized by *licence*, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had without the consent of the father of such of the parties so under age (if then living) first had and obtained; or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such

(*b*) S. 18.

guardian or guardians, then of the mother; (if living and unmarried) or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever. By the twelfth section, in case such guardians or mother shall be *non compos mentis*, or in parts beyond the seas, or shall refuse or withhold their consent, the person desirous of marrying may apply by petition to the lord chancellor, lord keeper, or lords commissioners of the great seal, who may proceed upon such petition in a summary way, and in case the marriage proposed shall appear to be proper they are judicially to declare it to be so by an order of court, and such order is to be deemed to be as effectual as if the guardians or mother had consented to such marriage. By the fourth section of the act no licence is to be granted to solemnize any marriage in any other church or chapel than those belonging to the parish or chapelry within which the usual place of abode of one of the persons to be married shall have been for the space of four weeks immediately before the granting of such licence; or where both or either of the parties dwell in an extra-parochial place, having no church or chapel wherein banns have been usually published, then in the parish church or chapel belonging to some parish or chapelry adjoining to such extra-parochial place. (*c*)

S. 12. Of petitioning the chancellor, &c. where the guardians or mother are not in a situation to consent or refuse to consent.

S. 4. Licences are to be granted to solemnize matrimony in the church or chapel of such parish only where one of the parties shall have resided for four weeks before.

With respect, however, to this last provision, and also to that contained in the first section, concerning the banns being published in the place where the parties dwell; the tenth section of the act provides, that after the solemnization of a marriage by banns it shall not be necessary to give any proof of the actual dwelling of the parties in the places where the banns were published; and that where the marriage is by licence it shall not be necessary to prove that the usual place of abode of one of the parties for the space of

S. 10. Proof of the parties dwelling in the parishes, &c. where marriages shall have been solemnized, not necessary to the validity of such marriage.

(*c*) But by s. 6. the archbishop of Canterbury's right to grant special licences to marry at any convenient time or place is reserved.

four weeks was in the parish or chapelry where the marriage was solemnized. And it enacts also, that evidence shall not be received in either of these cases to prove the contrary in any suit touching the validity of such marriage.

A marriage is good by banns or licence where the party is married in an assumed name, if he be known in the place where he is married by such assumed name.

The marriage act does not specify what shall be necessary to be observed in the publication of banns; or that the banns shall be published in the *true names* of the parties; but it must be understood as the clear intention of the legislature that the banns shall be published in the true names, because it requires that notice in writing shall be delivered to the minister of the true Christian and surnames of the parties seven days before the publication; and unless such notice be given, he is not obliged to publish the banns. But a publication in the name which the party has assumed, and by which he is known in the parish, appears to be sufficient; and would, indeed, be the proper publication where the party is not known by his real name. Thus, where a person whose baptismal and surname was Abraham Langley, was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only from his first coming into the parish till his marriage, which was about three years, the court of King's Bench held, that the marriage was valid. (*d*) And in the same court it was subsequently held, that a marriage by licence, not in the party's real name, but in the name which he had assumed, because he had deserted, he being known by that name only in the place where he lodged and was married, and where he had resided sixteen weeks, was valid. Lord Ellenborough C. J. said, "If this name had "been assumed for the purpose of fraud in order to enable "the party to contract marriage, and to conceal himself

(*d*) Rex *v.* Billinghurst, 1815, 3 M. and S. 250. This was a settlement case; but the point was fully argued, and many cases from the Consistory court were cited, notes of which are given in the Report, 259 to 267.

"from the party to whom he was about to be married, that "would have been a fraud on the marriage act and the "rights of marriage, and the court would not have given "effect to any such corrupt purpose. But where a name "has been previously assumed, so as to have become the "name which the party has acquired by reputation, that "is, within the meaning of the marriage act, the party's true "name."

The prosecutor must shew the proper consent of parents, &c. where the marriage is by licence.

It has been seen that the eleventh section of the marriage act makes the consent of the father, guardians, or mother, necessary to the validity of a marriage by licence, where the party is a minor. And it appears to have been held that it is incumbent on the party prosecuting to shew such consent.

Bridgewater's case.

The prisoner, who was indicted for bigamy, proved that his first marriage took place when he was a minor; and it was then contended on his behalf that this was no marriage unless a proper consent to it were proved. On the part of the prosecution it was said, that it lay on the prisoner to invalidate his own act, by proving that there was no such consent. The prisoner was convicted; but Le Blanc, J. reserved the point, taking the prisoner's own recognizance to appear at the next assizes: and the judges, without determining the point, agreed that he should not be called upon for judgment. (*e*)

Butler's case.

In a subsequent case it was, however, determined that if the prisoner prove (as it is competent for him to do) that his first marriage took place while he was a minor, it must be shewn, on the part of the prosecution, that such marriage, if by licence, was with the proper consent. The prisoner was indicted at the Old Bailey July Sessions 1803, for bigamy in marrying Elizabeth Field, his first wife Lydia Blackwell being still living: and it was proved that on the 12th Feb. 1791, he was married to Lydia Blackwell by li-

(*e*) Bridgewater's case, *cor.* Le Blanc, J. 1801. MS.

cence, and that she was living on the 8th of June last; and that on the 14th December 1800 he married Elizabeth Field. On behalf of the prisoner it was proved that he was born on the 2nd of January 1771, and that his father was then alive: and it was then contended that the first marriage was void as it was not proved to have been by the consent of his father. Lawrence, J. told the jury that he thought the marriage was to be presumed valid, unless the prisoner proved that he had not that consent, and under his direction the prisoner was found guilty. But the point being saved for the consideration of the judges, they held the conviction bad. (*f*)

Consent to the marriage in the case of illegitimate children.

Though illegitimate children are regarded by the law as not having any father, yet they have been held to be within the marriage act; and a marriage by licence between two illegitimate children, who were minors, without consent of parents or guardians, has been therefore held to be void. (*g*) And formerly it was the opinion of the court of King's Bench, that the power of consent given by the act to the *father* and mother, was intended to include reputed parents, as being interested in their children's welfare, and bound to provide for them by the laws of nature; (*h*) but in a case which came before the consistorial court in London in 1799, a different doctrine was held by the very learned judge of that court, who was of opinion that the reputed parents were not enabled to consent, and that the consent could be lawfully given only by a guardian appointed by the court of chancery. (*i*) And in a more recent case three of the judges of the court of King's Bench adopted the latter opinion, and after much argument and consideration certified to the master of the rolls "that all marriages, whether of legiti- "mate or illegitimate persons, are within the general pro-

(*f*) Butler's case, Old Bailey, July 1803, considered by the judges on the 31st of October 1803. MS.

(*g*) Rex *v.* Hadnett, 1 T. R. 96.

(*h*) Rex *v.* Edmonton, Cald. 435.

(*i*) Horner *v.* Liddiard, Rep. by Dr. Croke.

"vision of the statute 26 Geo. II. c. 33. which requires all "marriages to be by banns or licence; and that the consent "of the natural mother to the marriage by licence, of an "illegitimate minor, is not a sufficient consent within the "eleventh section of that act: and that consequently the "marriage in question was void by the said statute." (*k*)

Marriages celebrated in a chapel erected since the marriage act, held to be void.

One point upon the construction of the marriage act was determined by the court of King's Bench, with much reluctance; the able judge who then presided in that court, seeming to discourage an attempt to try a question of such serious consequence in a collateral way, on a settlement case; but, after consideration, it was decided that a marriage celebrated by banns, in a chapel erected since that statute was passed, and not upon the site of any ancient church or chapel, was void, although marriages had been *de facto* frequently celebrated there; the words of the statute "in "which chapel banns have been usually published" being held clearly to mean chapels existing at the time it was passed. (*l*) But as soon as the determination of the court in this case was known, a bill was introduced into parliament, which passed into a law, making valid all marriages which *had been* celebrated in any parish church or public chapel, erected since the passing of the 26 Geo. II. c. 33. and consecrated, and providing that the registers of such marriages shall be received as evidence. (*m*) The fourth section enacted, That the registers of marriages thereby made valid, should within twenty days after the first of August 1781, be removed to the church of the parish in which such chapel should be situated, or, if it should be situated in an extra parochial place, to the parish church next adjoining; to be kept with the registers of such parish. And these provisions were extended by the 44 Geo. III.

(*k*) Priestley *v.* Hughes, 11 East. 1. Grose, J differed and sent a separate certificate. The question was afterwards brought before the House of Lords in an appeal from the decree in this case.

(*l*) Rex *v.* Northfield, Dougl. 659.

(*m*) 21 Geo. III. c. 53.

c. 77. and the 48 Geo. III. c. 127. to marriages celebrated in such chapels before the 23d August 1808; and the registers of such marriages are in like manner to be removed to parish churches and transmitted to the bishop.

Marriages in Scotland and places beyond the seas good, if established according to the rites and customs of the country in which they were celebrated.

It has been stated that the marriage act does not extend to *Scotland*, nor to marriages solemnized beyond the seas; (*n*) and though the point was formerly much doubted, (*o*) it seems now to be settled that if minors domiciled in England withdraw themselves into Scotland, or places beyond the seas, for the purpose of evading this act, their marriage under such circumstances will be valid. (*p*) And in the case of a marriage in such distant place, it will be sufficient to shew it to have been performed according to the rites and custom of the country in which it is celebrated.

Marriage in St. Domingo.

In a late case respecting the settlement of a pauper, the facts were that a soldier on service with the British army in St. Domingo in 1796, being desirous of marrying the widow of another soldier who had died there in the service, the parties went to a chapel in the town, and the ceremony was there performed by a person appearing and officiating as a priest; the service being in French, but interpreted into English by a person who officiated as clerk, and understood at the time by the pauper to be the marriage service of the church of England. This was held sufficient evidence, after eleven years' cohabitation, that the marriage was properly celebrated; although the pauper (who was the woman) stated that she did not know that the person officiating was a priest. Lord Ellenborough, C. J. in delivering his opinion, consi-

(*n*) By s. 18, *Ante*, p. 291.

(*o*) See Burn's Just. *Marriage*, and the observations of Lord Mansfield in Robinson *v.* Bland, 1 Burr. 1079.

(*p*) Crompton *v.* Bearcroft, Bull. N. P. 113. and see the opinion of Eyre, C. J. in reasoning upon the case of Philips *v.* Hunter, 2 H. Blac. 412. And in Ilderton *v.* Ilderton 2 H. Blac. 145. it was taken to be clear that a marriage, celebrated in Scotland, is such a marriage as would entitle the woman to her dower in England.

dered the case. first, as a marriage celebrated in a place where the law of England prevailed, (supposing, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognized by subjects of England in a place occupied by the king's troops, who would impliedly carry that law with them,) and held that it would be a good marriage by that law: for it would have been a good marriage in this country before the marriage act, and consequently would be so now in a foreign colony, to which that act does not extend. In the second place, he considered it upon the supposition that the law of England had not been carried to St. Domingo by the king's forces, nor was obligatory upon them in this particular; and held that the facts stated would be evidence of a good marriage according to the law of that country, whatever it might be; and that upon such facts every presumption was to be made in favour of the validity of the marriage. (*q*) In a more recent case at the Old Bailey, a question was made whether a marriage of a Dissenter in Ireland when performed by a dissenting minister in a private room was valid. It was contended on behalf of the prisoner, who was indicted for bigamy, that the marriage was illegal from the clandestine manner in which it was celebrated; and several Irish statutes were cited, from which it was argued that the marriage of dissenters in Ireland ought at least to be in the face of the congregation, and not in a private room. But the Recorder is said to have been clearly of opinion that this marriage was valid, on the ground that as, before the marriage act, a marriage might have been celebrated in England in a house, and it was only made necessary, by the enactment of positive law, to celebrate it in a church, some law should be shewn requiring dissenters to be married in a church, or in the face of the congregation in Ireland, before this marriage could be pronounced to be illegal: Whereas one of the Irish statutes (11 Geo. II.) enacted that all marriages

Marriage by a dissenting teacher in a private room in Ireland.

(*q*) Rex *v.* Brampton, 10 East. 282.

celebrated by a dissenting teacher should be good, without saying at what place they should be celebrated. (*r*)

The marriage of lunatics void.

It was formerly held that if an idiot contracted matrimony, it was good and should bind him; but modern resolutions appear to have proceeded upon the more reasonable doctrine of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, is absolutely void. And as it might be difficult to prove the exact state of the mind of the party at the actual celebration of the nuptials, the statute 15 Geo. II. c. 30. has provided that if persons found lunatics under a commission, or committed to the care of trustees by any act of parliament, marry before they are declared of sound mind by the lord chancellor or the majority of such trustees, the marriage shall be totally void. (*s*)

Marriage by reputation not sufficient.

Upon indictments for bigamy it has been held not to be sufficient to prove a marriage by reputation, but that either some person present at the marriage must be called, or the original register, or an examined copy of it, be produced. (*t*) The marriage act, concerning which so much has been already said, requires that marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same, and that it shall be entered in the register; in which entry it shall be expressed, that the marriage was celebrated by banns or licence, and with consent, as the case may be, and be signed by the minister and parties married, and attested by two witnesses. (*u*) It is not, however, necessary to call one of the subscribing witnesses to the register in order

(*r*) Rex *v.* ———, Old Bailey Jan. Sess. 1815, *cor.* Sir J. Silvester Recorder. MS. The prisoner was an officer in the army; and his first marriage, upon which this question was raised, took place in 1787 at *Londonderry*. The second marriage was celebrated in London, according to the ceremonies of the church of England.

(*s*) 1 Blac. Com. 438, 439.

(*t*) Morris *v.* Miller, 4 Burr. 2057. Birt *v.* Barlow, Dougl. 162.

(*u*) 26 Geo. II. c. 33. s. 15.

to prove the identity of the persons married; but the register, or the copy of it, being produced, any evidence which satisfies the jury as to the identity of the parties is sufficient; as if their handwriting to the register be proved; or that bell ringers were paid by them for ringing for the wedding, or the like. (*w*) How far the *acknowledgment* of the defendant upon the subject of his marriage is sufficient evidence of the fact may admit of some doubt. In one case it was held, that proof of the prisoner's cohabiting with and acknowledging himself married to a former wife then living, such assertion being backed by his producing to the witness a copy of a proceeding in a Scotch court against him and his wife for having contracted the marriage improperly, (the marriage, however, being still good according to that law) was sufficient evidence of the first marriage; and upon such evidence, together with due proof of the second marriage, the prisoner was convicted. The point being reserved for the opinion of the judges, all of them (with the exception of Perryn B. and Buller J. who were absent) held the conviction proper. Two of them observed that this did not rest upon cohabitation and bare acknowledgment; for the defendant had backed his assertion by the production of the copy of the proceeding: but some of the judges thought that the acknowledgment alone would have been sufficient, and that the paper produced in evidence was only a confirmation of such acknowledgment. (*x*)

How far the acknowledgment of the defendant is evidence.

(*w*) 1 East. P. C. c. 12. s. 11. p. 472. Bull. N. P. 27.

(*x*) Truman's case, *Nottingham* Spr. Assiz. 1795, decided upon by the Judges in East. T. 1795, MS. Jud. 1 East. P. C. c. 12. s. 10. p. 470, 471. where see some remarks as to the admission of a bare acknowledgment in evidence in a case of this nature. That it may be difficult to say that it is not evidence to go to a jury: but that it must be admitted that it may under circumstances be entitled to little or no weight; for such acknowledgments made without consideration of the consequences, and palpably for other purposes at the time, are scarcely deserving of that name in the sense in which acknowledgments are received as evidence; more especially if made before the second marriage, or upon occasions when in truth they cannot be said to be to the party's own prejudice, nor so conceived by him at the time.

After proof of the first marriage the second wife may be a witness; but it is clear that the first and true wife cannot be admitted to give evidence against her husband. (*y*)

The true wife cannot be a witness.

Punishment.

Though the statute 1 Jac. I. c. 11. enacts, that persons offending against it shall suffer death as in cases of felony, clergy is not thereby taken away; and the punishment for bigamy by the 18th Eliz. c. 7. s. 2, 3. was burning in the hand and imprisonment not exceeding a year. (*z*) But the statute 35 Geo. III. c. 67. s. 1. reciting that the punishment of persons convicted under the act of 1 Jac. I. c. 11. had not proved effectual, enacts, "that if any person or persons "within his Majesty's dominions of *England* and *Wales*, "being married, or which hereafter shall marry, do, at any "time from and after the passing of this act, marry any "person or persons, the former husband or wife being alive, "and shall be in due manner convicted thereof under the "said act, shall be subject and liable to the same penalties, "pains, and punishments, as, by the laws now in force, "persons are subject and liable to who are convicted of "grand or petit larceny."

(*y*) 1 Hale 693. 1 East. P. C. c. 12. s. 9. p. 469. and 1 Hawk. c. 42. s. 8. where it is said that this rule has been so strictly taken that even an affidavit to postpone the trial made by the first wife has been rejected, and Old Bailey, Feb. Sess. 1786 is cited.

(*z*) And by 19 Geo. III. c. 74. s. 3. a moderate fine or whipping in the manner therein specified may be substituted for the burning.

CHAPTER THE TWENTY-FIFTH.

Of Libel and Indictable Slander.

What publications in general are libellous.

IT appears to be well settled that publications blaspheming God or turning the doctrines of the Christian religion to contempt and ridicule may be made the subject of indictment; and it is now fully established, though some doubt seems formerly to have been entertained upon the subject, that such immodest and immoral publications as tend to corrupt the mind and to destroy the love of decency, morality, and good order, are also offences at common law. (*a*) It is also a misdemeanor wantonly to defame or indecorously to calumniate that œconomy, order, and constitution of things which make up the general system of the law and government of the country. (*b*) And it is especially criminal to degrade or calumniate the person and character of the sovereign, and the administration of his government by his officers and ministers of state, (*c*) or the administration of justice by his judges. (*d*) And the same policy which prohibits seditious comments on the king's conduct and government extends on the same grounds to similar reflections on the proceedings of the two houses of parliament. (*e*) Such publications also as tend to cause animosities between this country and any foreign state, by the personal abuse of the sovereign of such state, his ambassadors, or other public ministers, may be treated as libels. (*f*) With respect to

(*a*) See the cases collected in Starkie on Lib. 486 to 504.

(*b*) Holt on Lib. 82.

(*c*) Rex *v.* Lambert and Perry, 2 Campb. 398.

(*d*) Starkie on Lib. 532.

(*e*) Starkie on Lib. 535.

(*f*) Rex *v.* Peltier, Holt on Lib. 78. Rex *v.* D'Eon, 1 Blac. R. 517.

libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule. (*g*)

Of slanderous words.

Upon some of these subjects a publication by slander or words spoken only, though not properly a libel, (*h*) may be the subject of criminal proceeding, as will be shewn in the course of the chapter.

Of the mode of expression.

A libel may be as well by descriptions and circumlocutions as in express terms; therefore scandal conveyed by way of allegory or irony amounts to a libel. As where a writing, in a taunting manner, reckoning up several acts of public charity done by a person, said "*You will not play the Jew, nor the hypocrite,*" and then proceeded, in a strain of ridicule, to insinuate that what the person did was owing to his vain glory. Or where a publication, pretending to recommend to a person the characters of several great men for his imitation, instead of taking notice of what great men are generally esteemed famous for, selected such qualities as their enemies accuse them of not possessing; (as by proposing such a one to be imitated for his courage who was known to be a great statesman but no soldier, and another to be

(*g*) 1 Hawk. P. C. c. 73. s. 1, 2, 3, 7. 4 Bac. Abr. *Libel*, p. 449. and see as to libel by a picture, a late case, Du Bost *v.* Beresford, 2 Campb. 511.

(*h*) A libel is termed *Libellus famosus seu infamatoria scriptura*, and has been usually treated of as scandal *written* or expressed by symbols. Lamb. Sax. Law, 64. Bract. lib. 3. c. 36. 3 Inst. 174. 5 Co. 125. 1 Lord Raym. 416. 2 Salk. 417, 418. Libel may be said to be a technical word, deriving its meaning rather from its use than its etymology. "There is "no other name but that of *libel* "applicable to the offence of libelling: and we know the offence "specifically by that name, as we "know the offences of horse-stealing, forgery, &c. by the names "which the law has annexed to "them." By Lord Camden, in Rex *v.* Wilkes, 2 Wils. 121.

imitated for his learning who was known to be a great general but no scholar) such a publication being as well understood to mean only to upbraid the parties with the want of these qualities as if it had doue so directly and expressly. (*i*) And upon the same ground not only an allegory but a publication in hieroglyphics, or a rebus or anagram, which are still more difficult to be understood, may be a libel; and a court, notwithstanding its obscurity and perplexity, shall be allowed to judge of its meaning, as well as other persons. (*k*) And it is now well established that slanderous words must be understood by the court in the same sense as the rest of mankind would ordinarily understand them. (*l*) Formerly it was the practice to say that words were to be taken in the more lenient sense; but that doctrine is now exploded; they are not to be taken in the more lenient or more severe sense; but in the sense which fairly belongs to them, and which they were intended to convey. (*m*)

Name of the person libelled in blanks.

Upon the same principles it has been resolved that a defamatory writing, expressing only one or two letters of a name, in such a manner that from what goes before, and follows after, it must needs be understood to signify a particular person, in the plain, obvious, and natural construction of the whole, and would be nonsense if strained to any

(*i*) 1 Hawk. P. C. c. 73. s. 4. 4 Bac. Abr. *Libel*, (A) 3. p. 453.

(*k*) Holt on Libel, 235, 236.

(*l*) Woolnoth *v.* Meadows, 5 East. 463. In this case the defendant had said of the plaintiff, "that his "character was infamous—that he "would be disgraceful to any so- "ciety—that *delicacy* forbad him "from bringing a direct charge— "but it was a *male* child who "complained to him;" and these words were understood to mean a charge of unnatural practices.

(*m*) By Lord Ellenborough, C. J. in Rex *v.* Lambert and Perry, 2 Campb. 403. And in a case of libel, Rex *v.* Watson and others, 2 T. R. 206. Buller J. said, "Upon occa- "sions of this sort I have never "adopted any other rule than that "which has been frequently re- "peated by Lord Mansfield to "juries, desiring them to read the "paper stated to be a libel as men "of common understanding, and "say whether in their minds it "conveys the idea imputed."

other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say that a writing which is understood by every one of the meanest capacity cannot possibly be understood by a judge or jury. (*n*)

Indictment will lie for a libel on a body of men.

An indictment lies for general imputations on a body of men, though no individuals be pointed out, because such writings have a tendency to inflame and disorder society, and are therefore within the cognizance of the law. (*o*) And scandal published of three or four persons is punishable at the complaint of one or more, or all of them. (*p*)

Actions and indictments for libels co-extensive.

It appears to have been considered that the remedies by action and indictment for libels are co-extensive, and may be regarded as upon the same footing. (*q*)

(*n*) 1 Hawk. P. C. c. 73. s. 5. 4 Bac. Abr. *Libel* (A) 3. p. 453. where it is said in the marginal note that if an application is made for an information in a case of this kind, some friend to the party complaining should, by affidavit, state the having read the libel, and understanding and believing it to mean the party. In a late case Lord Ellenborough, C. J. held, upon argument, that the declarations of spectators, while they looked at a libellous picture in an exhibition room, were evidence to shew that the figures pourtrayed were meant to represent the parties stated to be libelled. Du Bost *v.* Beresford, 2 Campb. 512.

(*o*) Holt on Lib. 237.

(*p*) *Id. Ibid.* In Rex *v.* Benfield and Sanders, 2 Burr. 980. it was held, that an information lay against two for singing a libellous song on A. and B. which first abused A. and then B. And it was said that if the defendants had sung separate stanzas, the one reflecting on A. and the other on B. the offence would still have been entire. A libel upon one of a body of persons without naming him is a libel upon the whole, and may be so described; and where a paper is published equally reflecting upon a number of people, it reflects upon all, and readers according to their different opinions may apply it so. Rex *v.* Jenour, 7 Mod. 400.

(*q*) Starkie on Lib. 150. 165. 550. Holt on Lib. 215, 216. Bradley *v.* Methuen, 2 Ford's MS. 78. This must be understood, however, of

The party cannot justify that the contents of a libel are true.

It is quite clear that in an indictment or criminal prosecution for a libel the party cannot justify that its contents are true, or that the person upon whom it is made had a bad reputation. The ground of the criminal proceeding is the *public mischief* which libels are calculated to create, in alienating the minds of the people from religion and good morals, rendering them hostile to the government and magistracy of the country, and where particular individuals are attacked, in causing such irritation in their minds as may induce them to commit a breach of the public peace. The law, therefore, does not permit the defendant to give the truth of the libellous matter in justification; any attempt at which in the instances of libels against religion, morality, or the constitution, would be attended with consequences of the greatest absurdity; and, in the case of libels upon individuals, might be extremely unjust, and could never afford a substantial defence to the charge. A libel against an individual may consist in the exposure of some personal deformity, the actual existence of which would only shew the greater malice in the defendant; and even if it contain charges of misconduct founded in fact the publication will not be the less likely to produce a violation of the public tranquillity. It has been observed that the greater appearance of truth there may be in any malicious invective, it is so much the more provoking; and that, in a settled state of government, the party grieved ought to complain, for every injury done to him, in the ordinary course of law, and not by any means to revenge himself by the odious proceeding of a libel. (*r*)

cases where the libel from its nature and subject inflicts a private injury, and not of those cases in which the public only can be said to be affected by the libel.

(*r*) 1 Hawk. P. C. c. 73. s. 6. 4 Bac. Abr. *Libel* (A) 5. p. 455. 4 Blac. Com. 150, 151. Starkie on Libel 556 *et sequ.* Holt on Lib. 275 *et sequ.* But though the truth is no justification in a criminal prosecution, yet in many instances it is considered as an extenuation of the offence; and the court of King's Bench has laid down this general rule, that it will not grant an information for a libel, unless the prosecutor who applies for it,

But there are some circumstances which will protect a publication from being deemed libellous. It has been resolved that no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel; for it would be a great discouragement to suitors to subject them to public prosecution in respect of their applications to a court of justice. (*s*) Thus where a charge was, that the defendant, in a certain affidavit before the court, had said that the plaintiff, in a former affidavit against the defendant, had sworn falsely, the court held that this was not libellous; for in every dispute in a court of justice, where one by affidavit charges a thing and the other denies it, the charges must be contradictory, and there must be affirmation of falsehood. (*t*) It

But proceedings in a court of justice will not be deemed libellous.

makes an affidavit asserting directly and pointedly that he is innocent of the charge imputed to him. This rule however may be dispensed with if the person libelled resides abroad, or if the imputations of the libel are general and indefinite, or if it is a charge against the prosecutor for language which he has held in parliament. 4 Blac. Com. 151, note (6). Dougl. 271. 372.

(*s*) 1 Hawk. P. C. c. 73. s. 8. 4 Bac. Abr. *Libel* (A) 4. p. 454. It is holden by some that no want of jurisdiction in the court to which the complaint shall be exhibited, will make it a libel: because the mistake of the court is not imputable to the party, but to his counsel: but Hawkins says (1 Hawk. c. 73. s. 8.) that if it manifestly appears that a prosecution is entirely false, malicious, and groundless, and commenced, not with a design to go through with it, but only to expose the defendant's character under the shew of a legal proceeding, he cannot see any reason why such a mockery of public justice should not rather aggravate the offence than make it cease to be one. Upon this point Mr. Starkie, after referring to the several authorities, says, that it may be collected generally that no action can be maintained for any thing said or otherwise published, in the course of a judicial proceeding, whether criminal or civil; though for a malicious and groundless prosecution, an action, and *perhaps* an indictment, may be supported, founded on the whole proceeding. Starkie on Lib. 223.

(*t*) Astley *v.* Younge, 2 Burr. 817.

is also held, that no presentment of a grand jury can be a libel, not only because persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper evidence for what they do, but also because it would be of the utmost ill consequence in any way to discourage them from making their enquiries with that freedom and readiness which the public good requires. (*u*) And where a court-martial, after stating in their sentence the acquittal of an officer against whom a charge had been preferred, subjoined thereto a declaration of their opinion, that the charge was malicious and groundless, and that the conduct of the prosecutor, in falsely calumniating the accused, was highly injurious to the service, it was held that the president of the court-martial was not liable to an action for a libel for having delivered such sentence and declaration to the judge advocate; and Mansfield C. J. in delivering his opinion said, "If it appear that the "charges are absolutely without foundation, is the presi- "dent of the court-martial to remain perfectly silent on "the conduct of the prosecutor; or can it be any offence "for him to state that the charge is groundless and mali- "cious?" (*w*)

And speeches of members of parliament are privileged.

The members of the two houses of parliament, by reason of their privilege, are not answerable at law for any personal reflections on individuals contained in speeches in their respective houses; for policy requires that those who are by the constitution appointed to provide for the safety and welfare of the public should, in the execution of their high functions, be wholly uninfluenced by private considerations. (*x*)

(*u*) 1 Hawk. P. C. c. 73. s. 8. 4 Bac. Abr. *Libel* (A) 4, p. 455.

(*w*) Jekyll *v.* Sir John Moore, 2 New. R. 341.

(*x*) Holt on Lib. 190. Starkie on Lib. 211. Rex *v.* Lord Abingdon, 1 Esp. R. 226. By 4 Hen. VIII. c. 8. members of parliament are protected from all charges against them for any thing said in either house: and this is further declared in the Bill of Rights, 1 W. & M. st. 2. c. 2.

Thus the actual proceedings in courts of justice and in parliament are exempted from being deemed libellous: it becomes important to enquire in the next place how far the same privilege will be extended to communications of those proceedings to the public, made with impartiality and correctness.

How far the publication of proceedings in courts of justice is allowable.

It has always been held that a publication of the proceedings in a court of justice will not be protected unless it be a *true and honest* statement of those proceedings. (*y*) But provided it were of that character, the doctrine seems at one time to have been that it might be made to the full extent of stating what had actually taken place. (*z*) More recently, however, it has been said that it must not be taken for granted, that the publication of every matter which passes in a court of justice, however truly represented, is under all circumstances, and with whatever motive published, justifiable; and that such doctrine must be taken with grains of allowance. (*a*) And Lord Ellenborough, C. J. said "It "often happens that circumstances necessary, for the sake "of public justice, to be disclosed by a witness in a judicial "enquiry, are very distressing to the feelings of individuals "on whom they reflect: and if such circumstances were "afterwards wantonly published, I should hesitate to say "that such unnecessary publication was not libellous, "merely because the matter had been given in evidence in "a court of justice." (*b*) In a subsequent case, not relating directly to this point, but to the publication of proceedings in parliament, Bayley, J. said "It has been argued

(*y*) Waterfield *v.* the Bishop of Chichester, 2 Mod. 118. Rex *v.* Wright, 8 T. R. 297, 298. per Lawrence, J. Stiles *v.* Nokes, 7 East. 493.

(*z*) Curry *v.* Walter, 1 Bos. & Pul. 523. referred to by Lawrence, J. in Rex *v.* Wright, 8 T. R. 298.

(*a*) By Lord Ellenborough, C. J. and Grose, J. in Stiles *v.* Nokes, 7 East. 503.

(*b*) *Id. Ibid.* And see Rex *v.* Salisbury, 1 Lord Raym. 341. that it is indictable to publish a scandalous petition to the House of Lords, or a scandalous affidavit made in a court of justice.

"that the proceedings of courts of justice are open to pub-
"lication. Against that, as an unqualified proposition, I
"enter my protest. Suppose an indictment for blasphemy,
"or a trial where indecent evidence was necessarily intro-
"duced; would every one be at liberty to poison the minds
"of the public, by circulating that which for the purposes
"of justice the court is bound to hear? I should think
"not: and it is not true therefore that in all instances the
"proceedings of a court of justice may be published. Again
"it may be said that counsel have a right, in pursuance of
"their instructions, and whilst the cause is going on, to
"endeavour to produce an effect by making such observa-
"tions on the credit and character of parties and their wit-
"nesses, as sometimes, when the cause is over, perhaps they
"are sorry for. But have they therefore, or any other
"person who hears them, a right afterwards to publish those
"observations? I have no hesitation in saying that when
"the occasion ceased the right also would cease, and that
"it would be no justification to plead that such a publica-
"tion was a transcript of the counsel's speech." (*c*)

Publication of *Ex parte* examinations before a magistrate may be libellous.

It should be observed also, that the publication of preliminary examinations before a magistrate taken *ex parte*, will not come within the principle by which the fair reports of proceedings in courts of justice have been held to be privileged. Such publications have a tendency to cause great mischief by perverting the public mind, and disturbing the course of justice; and if they contain libellous matter, will be considered as highly criminal. (*d*)

(*c*) Rex *v.* Creevey, 1 M. & S. 281. In the same case Lord Ellenborough, C. J. said, "As to Curry "*v.* Walter (ante, note *z*) it is not "necessary for the present purpose "to discuss that case; whenever "it becomes necessary I shall say "that the doctrine there laid down "must be understood with very "great limitations; and shall never "fully assent to the unqualified "terms attributed in the report of "that case to Eyre, C. J."

(*d*) Rex *v.* Lee and Another, 5 Esp. 123. Rex *v.* Fisher and Others, 2 Campb. 563.

How far the publication of proceedings in parliament is allowable.

Though the publication of a proceeding in parliament will, in general, be considered as privileged and protected from being deemed libellous; (*e*) and the printing and delivering a petition to members of a committee of the House of Commons, being according to the order of proceedings of parliament and their committees, has been held to be justifiable; (*f*) yet it may be doubted how far the circulation of a copy of a writing containing matter of an injurious tendency to the character of an individual, though published for the use of the members, is legitimate and exempted from prosecution. (*g*) And it is clear, that the publication of the speech of a member of parliament, if it contain matter of libel, is not protected, even though such publication be made by the member himself. In a case upon this subject, Lord Kenyon, C. J. observed that if the words in question had been spoken in the House of Lords, and confined to its walls, the court of King's Bench would have had no jurisdiction to call a member of that house before them, to answer for such words as an offence; but that the offence was the publication of them in the public papers, under the authority of the member, with his sanction, and at his expence: that a member of parliament had certainly a right to publish his speech, but that his speech should not be made the vehicle of slander against any individual; if it were, it would be a libel. (*h*) And in a more recent case it was held by the court of King's Bench, that a member of the House of Commons may be convicted upon an indictment for a libel, in publishing in a newspaper the report of a speech delivered by him in that house, if it contain libellous matter, although the publication be a correct report of such speech, and be made in consequence of an incorrect

(*e*) Rex *v.* Wright, 8 T. R. 293. In this case a former case of Rex *v.* Williams, 2 Show. 471. Comb. 18. was animadverted upon by Lord Kenyon, C. J. and Grose, J. as having happened in the worst of times.

(*f*) Lake *v.* King, 1 Saund. 131.

(*g*) See the judgment of Lord Ellenborough, C. J. in Rex *v.* Creevey, 1 M. & S. 278.

(*h*) Rex *v.* Lord Abingdon, 1 Esp. 226.

publication having appeared in that and other newspapers. (*i*)

Having treated generally of the publications which may be considered as libellous, it may be useful to refer to some of the particular points which have been holden, respecting publications: I. Against the Christian religion: II. Against morality: III. Against the constitution: IV. Against the king: V. Against the two houses of parliament: VI. Against the government: VII. Against the magistrates and the administration of justice: VIII. Against private individuals: and, IX. Against foreigners of distinction.

Of publications against the Christian religion.

I. It has been before observed, (*k*) that blaspheming God, or turning the doctrines of the Christian religion to contempt and ridicule, is an indictable offence. At common law, all blasphemies against God, as denying His being or providence; and all contumelious reproaches of Jesus Christ; all profane scoffing at the holy scripture, or exposing any part thereof to contempt or ridicule; and also seditious words in derogation of the established religion; are considered as offences, tending to subvert all religion and morality, and punishable by the temporal courts with fine and imprisonment, and also infamous corporal punishment in the discretion of the court. (*l*)

Statutes upon this subject.

Some provisions have also been made upon this subject by statutes. The 1 Edw. VI. c. 1. (*m*) enacts that persons reviling the sacrament of the Lord's supper by contemptuous words or otherwise, shall suffer imprisonment. The statute 1 Eliz. c. 2. enacts that if any *minister* shall speak any thing in derogation of the book of common prayer he shall, if not beneficed, be imprisoned one year for the first

(*i*) Rex *v.* Creevey, 1 M. & S. 273.

(*k*) *Ante*, p. 302.

(*l*) See the cases collected in 1 Hawk. P. C. c. 5.

(*m*) Repealed by 1 Mary, c. 2. and revived by 1 Eliz. c. 1.

offence, and for life the second; and if he be beneficed, shall for the first offence be imprisoned six months, and forfeit a year's value of his benefice; for the second, shall be deprived and suffer one year's imprisonment; and for the third shall in like manner be deprived and suffer imprisonment for life. And that if any person whatsoever shall in plays, songs, or other open words, speak any thing in derogation, depraving, or despising of the said book, or shall forcibly prevent the reading of it, or cause any other service to be read in its stead, he shall forfeit for the first offence 100 marks; for the second 400; and for the third, shall forfeit all his goods and chattels, and suffer imprisonment for life. By the 3 Jac. I. c. 21. a person using the name of the Holy Trinity profanely, or jestingly, in any stage-play, interlude, or show, shall be liable to a *qui tam* penalty of ten pounds. The 1 W. III. c. 18. s. 17. enacted that whoever should deny in his preaching or writing the doctrine of the blessed Trinity, should lose all benefit of the act for granting toleration. This section is now repealed by 53 Geo. III. c. 160. but while it was in existence it was considered as operating to deprive the offender of the benefit therein mentioned, leaving the punishment of the offence as for a misdemeanor at common law. (*n*) By the 9 & 10 W. III. c. 32. if any person educated in or having made profession of the Christian religion, shall by writing, printing, teaching, or advised speaking, deny the Christian religion to be true, or the Holy Scriptures to be of Divine authority, he shall, upon the first offence, be rendered incapable to hold any office or place of trust; and for the second, be rendered incapable of bringing any action, being guardian, executor, legatee, or purchaser of lands, and shall suffer three years' imprisonment without bail. (*o*) A person

(*n*) By Lord Kenyon in Rex *v.* Williams, 1797, Holt on Lib. 66.

(*o*) But the delinquent publicly renouncing his error in open court within four months after the first conviction, is to be discharged for that once from all disabilities.

offending under this statute is also still indictable at common law. (*p*)

To reproach the Christian religion is to speak in subversion of the law.

Upon the trial of an information against the defendant for uttering expressions grossly blasphemous, Hale C. J. observed, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, state, and government, and therefore punishable in the court of King's Bench. That to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. (*q*)

The Christian religion is part of the law of the land.

In a case where the defendant had been convicted for publishing several blasphemous libels, in which the miracles of our Saviour were turned into ridicule and contempt, and his life and conversation calumniated, it was moved in arrest of judgment that this was not an offence within the cognizance of the temporal courts at common law; but the court would not suffer the point to be argued, saying that the Christian religion, as established in this kingdom, is part of the law; and therefore, that whatever derided Christianity derided the law, and consequently must be an offence against the law. (*r*) It was also moved in arrest of judgment, that as the intent of the book was only to shew that the miracles of Jesus Christ were not to be taken in their literal sense, it could not be considered as attacking Christianity in general, but only as striking against one received proof of his being the Messiah; to which the court said, that the attacking Christianity in the way in

But though to write against Christianity *in*

(*p*) Barnard. 162. 2 Str. 834. Fitzgib. 64. Rex *v.* Williams 1797. Rex *v.* Caton 1812. This statute also related to persons denying, as therein mentioned, respecting the *Holy Trinity*; but such provisions are repealed by 53 Geo. III. c. 160.

(*q*) Rex *v.* Taylor, Vent. 293. 3 Keb. 607.

(*r*) Rex *v.* Woolston, Barnard. 162. 2 Str. 834. Fitzgib. 64.

which it was attacked in this publication was destroying the very foundation of it; and that, though there were professions in the book that its design was to establish Christianity upon a true bottom by considering these narrations in Scripture as emblematical and prophetical, yet that such professions were not to be credited, and that the rule is *allegatio contra factum non est admittenda*. But the court also said, that though to write against Christianity *in general* is clearly an offence at common law, they laid a stress upon the word general, and did not intend to include disputes between learned men upon particular controverted points; and in delivering the judgment of the court Raymond, Lord C. J. said, "I would have it taken notice of that we do not med- "dle with any differences of opinion, and that we interpose "only where the very root of Christianity itself is struck "at." (*s*)

general is an offence at common law, the court will not meddle with differences of opinion upon controverted points.

The doctrine of the Christian religion constituting part of the law of the land, was recognized in a later case, where the judgment of the Court of King's Bench was pronounced upon a person convicted of having published a very impious and blasphemous libel called *Paine's Age of Reason*. (*t*) Ashhurst J. said, that although the Almighty did not require the aid of human tribunals to vindicate his precepts, it was nevertheless fit to shew our abhorrence of such wicked doctrines as were not only an offence against God, but against all law and government, from their direct tendency to dissolve all the bonds and obligations of civil society; and that it was upon this ground that the Christian religion constituted part of the law of the land. That if the name of our Redeemer was suffered to be traduced, and his holy

The dread of future punishment is one of the principal sanctions of the law.

(*s*) Rex *v.* Woolston, Fitzgib. 66.

(*t*) This libel was of the worst kind, attacking the truth of the Old and New Testaments, arguing that there was no genuine revelation of the will of God existing in the world; and that reason was the only true faith which laid any obligations on the conduct of mankind. In other respects also it ridiculed and vilified the prophets, our Saviour, his disciples, and the Sacred Scriptures.

religion treated with contempt, the solemnity of an oath, on which the due administration of justice depended, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments. (*u*)

Rational and dispassionate discussions are allowable.

Contumely and contempt are what no establishment can tolerate; but, on the other hand, it would not be proper to lay any restraint upon rational and dispassionate discussions of the rectitude and propriety of the established mode of worship. (*w*) A sensible writer upon the subject of libel says as to this point, "that it may not be going too far to "infer, from the principles and decisions, that no author or "preacher who fairly and conscientiously promulgates the "opinions with whose truth he is impressed, for the benefit "of others, is, for so doing, amenable as a criminal; that a "malicious and mischievous intention is in such case the "broad boundary between right and wrong; and that if it "can be collected from the offensive levity with which so "serious a subject is treated, or from other circumstances, "that the act of the party was malicious, then, since the "law has no means of distinguishing between different de-"grees of evil tendency, if the matter published contain "any such tendency, the publisher becomes amenable to "justice." (*x*)

As to the extent of this offence and the nature and certainty of the words, it appears to be immaterial whether the publication is oral or written; though the committing mischievous matter to print or writing, and thereby affording it a wider circulation, would undoubtedly be considered as an aggravation, and affect the measure of punishment. (*y*)

Of publications against morality.

II. When the star-chamber had been abolished it appears that the court of King's Bench came to be considered as the *custos morum*, having cognizance of all offences against the

(*u*) Rex *v.* Williams, 1797. Holt on Lib. 69 note (*e*).

(*w*) 4 Blac. Com. 51.

(*x*) Starkie on Lib. 496, 497.

(*y*) Starkie on Lib. 493.

public morals; (*z*) under which head may be comprehended representations whether by writing, picture, sign, or substitute, tending to vitiate and corrupt the minds and morals of the people. (*a*) Formerly, indeed, it appears to have been holden that publications of this kind were not punishable in the temporal courts; (*b*) but a different doctrine has since been established, (*c*) and in late times indictments for obscene writings and prints have frequently been preferred without any objection having been made to the jurisdiction of the temporal courts.

Oral communications.

The principle of the cases upon this subject seems to comprehend oral communications, when made before a large assembly, and when there is a clear *tendency* to produce immorality; as in the case of the performance of an obscene play. (*d*)

Of publications against the constitution.

III. Libels against the constitution, abstracted from all personal allusions, do not appear either in ancient or modern times to have been often made the subject of legal enquiry. In general, publications upon the constitution avoiding all discussions of personal rights and privileges are speculative in their nature, and not calculated to generate popular heat. But if they should be of a different description, tending to degrade and vilify the constitution, to promote insurrection, and circulate discontent through its members, they would, without doubt, be considered as seditious and criminal. (*e*)

Thus it appears to have been adjudged, that though no indictment lay for saying that the laws of the realm were not

(*z*) Sir Ch. Sedley's case, 1663. Keb. 720. 2 Str. 790. Sid. 168.

(*a*) Holt on Lib. 73.

(*b*) Read's case, 11 Mod. 142. 1 Hawk. P. C. c. 73. s. 9.

(*c*) Rex *v.* Curl. 2 Str. 788. Rex *v.* Wilkes, 4 Burr. 2527.

(*d*) Stark. on Libel 504. In Rex *v.* Curl, 2 Str. 790. it was stated that there had been many prosecutions against the players for obscene plays, but that they had had interest enough to get the proceedings stayed before judgment.

(*e*) Holt on Lib. 86.

the laws of God, because true it is that they are not the laws of God; yet that it would be otherwise to say that the laws of the realm are contrary to the laws of God.(*f*) And a defendant was convicted on an information charging him with having published, concerning the government of England and the traitors who adjudged king Charles the First to death, that the government of the kingdom consists of three estates, and that if a rebellion should happen in the kingdom, unless that rebellion was against the three estates, it was no rebellion. (*g*) In another case a person was convicted for publishing a libel, in which it was suggested that the revolution was an unjust and unconstitutional proceeding, and the limitation established by the act of settlement was represented as illegal, and that the revolution and settlement of the crown as by law established had been attended with fatal and pernicious consequences to the subjects of this kingdom. (*h*)

Of publications against the king.

IV. Though a different construction may have prevailed in more arbitrary times, it is now settled that bare words, not relative to any act or design, however wicked, indecent, or reprehensible they may be, are not in themselves overt acts of high treason; but only a misprision, punishable at common law by fine and imprisonment, or other corporal punishment. (*i*) Though words may expound an overt act, and shew with what intent it was done. (*k*) And, generally speaking, any words, acts, or writing tending to vilify or disgrace the king, or to lessen him in the esteem of his subjects, or any denial of his right to the crown, even in com-

(*f*) 2 Rol. Abr. 78.

(*g*) Rex *v.* Harrison 1677. 3 Keb. 841. Vent. 324. And a treatise upon hereditary right was holden to be a libel, though it contained no reflection upon any part of the then government, Reg. *v.* Bedford 1711. 2 Str. 789. Gilb. 297.

(*h*) Rex *v.* Nutt, 1754. Dig. L. L. 126. and see Dr. Shebbeare's case, and Rex *v.* Paine, Holt on Lib. 88, 89. and Starkie on Lib. 508.

(*i*) 1 East. P. C. c. 2. s. 55. p. 117.

(*k*) Crohagan's case, Cro. Car. 332.

mon and unadvised discourse, amount at common law to a misprision punishable by fine and corporal punishment. (*l*)

Statutes.

There are also some legislative provisions upon this subject. The 3 Edw. I. c. 34. enacts that none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander, may grow between the king and his people, and the great men of the realm. (*m*) And with a view to the security of the succession of the house of Hanover, according to the act of settlement, a law was passed declaring it to be treason to write or print against it. (*n*)

The nature of the offence of libel against the monarch personally, has been ably explained and illustrated, according to the more mild and liberal doctrines of the present time, in a case of recent occurrence.

Rex *v.* Lambert and Perry. It is not libellous for a writer who allows the sovereign to be solicitous for the welfare of his subjects, and who has no intention of calumniating him, or of bringing his personal go-

The defendant was charged with having published a libel to the following tenor and effect: "What a crowd of blessings rush upon one's mind, that might be bestowed upon the country in the event of a total change of system! Of all monarchs indeed since the revolution, the successor of George the Third will have the finest opportunity of becoming nobly popular." Lord Ellenborough, C. J. in addressing the jury stated, that the first sentence of this passage would easily admit of an innocent interpretation; that the fair meaning of the expression "change of system" was a change of political system—not a change in the frame of

(*l*) 4 Blac. Com. 123.

(*m*) It is said to have been resolved by all the judges that all writers of false news are indictable and punishable: (4 Read. St. L. Dig. L. L. 23) and probably at this day the fabrication of news likely to produce any public detriment would be considered as criminal. Starkie on Lib. 546.

(*n*) 6 Anne c. 7. and see other statutes which were passed for the purpose of guarding the king's character and title, cited in Starkie on Lib. 520, 521.

vernment into public odium, to express regret that he has taken an erroneous view of any question of foreign or domestic policy.

the established government—but in the measures of policy which had been for some time pursued; and that by total change of system was certainly not meant *subversion* or *demolition*, the descent of the crown to the successor of his Majesty being mentioned immediately after. His lordship then proceeded, "If a person who admits the wisdom and "virtues of his Majesty, laments that in the exercise of "these he has taken an unfortunate and erroneous view of "the interests of his dominions, I am not prepared to say "that this tends to degrade his Majesty, or to alienate the "affections of his subjects. I am not prepared to say that "this is libellous. But it must be with perfect decency and "respect, and without any imputation of bad motives. Go "one step further, and say or insinuate that his Majesty acts "from any partial or corrupt view, or with an intention to "favour or oppress any individual, or class of men, and it "would become most libellous." Upon the second sentence, after stating that it was more equivocal, and telling the jury that they must determine what was the fair import of the words employed, not in the more lenient or severe sense, but in the sense fairly belonging to them, and which they were intended to convey, Lord Ellenborough proceeded, "Now do these words mean, that his Majesty is ac-"tuated by improper motives, or that his successor may "render himself nobly popular by taking a more lively in-"terest in the welfare of his subjects? Such sentiments, as "it would be most mischievous, so it would be most crimi-"nal to propagate. But, if the passage only means that "his Majesty, during his reign, or any length of time, may "have taken an imperfect view of the interests of the coun-"try, either respecting our foreign relations, or the system "of our internal policy; if it imputes nothing but honest "error, without moral blame, I am not prepared to say that "it is a libel." And again towards the conclusion of his address his lordship said, "The question of intention is for "your consideration. You will not distort the words, but "give them their application and meaning as they impress "your minds. What appears to me most material is the

"substantive paragraph itself; (*o*) and if you consider it as "meant to represent that the reign of his Majesty is the "only thing interposed between the subjects of this country "and the possession of great blessings, which are likely to "be enjoyed in the reign of his successor, and thus to ren- "der his Majesty's administration of his government odious, "it is a calumnious paragraph, and to be dealt with as a "libel. If on the contrary you do not see that it means "distinctly, according to your reasoning, to impute any "purposed mal-administration to his Majesty, or those act- "ing under him, but may be fairly construed as an expres- "sion of regret, that an erroneous view has been taken of "public affairs, I am not prepared to say that it is a libel. "There have been errors in the administration of the most "enlightened men." (*p*)

Of publications against the two houses of parliament.

V. The two houses of parliament are an essential part of the constitution, and entitled to reverence and respect on account of the important public duties, which they have to discharge. But as they have the power of treating libels against them as breaches of their privileges, and vindicating them in the nature of contempts, more cases of such libels are to be met with in their journals, than in the proceedings of the courts of law. The common law, however, is fully capable of taking cognizance of any publications reflecting in a libellous manner upon the members or proceedings of the houses of parliament; (*q*) and it seems

(*o*) The libel was published in a newspaper; and it had been allowed to the defendant to have read in evidence an extract from the same paper connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter, and printed in a different character.

(*p*) Rex *v.* Lambert and Perry, 2 Campb. 398.

(*q*) As in Rex *v.* Rayner. 2 Barnard. 293. where the defendant was convicted of printing a scandalous libel on the lords and commons; and in Rex *v.* Owen, 25 Geo. II. MS. Dig. L. L. 67. In Rex *v.* Stockdale, 28 Geo. III. an information was filed by the Attorney General for a libel upon the house of commons. A prosecution was also instituted in Rex *v.* Reeves,

rather to have been the inclination of parliament in modern times to direct prosecutions for such offences in the courts of common law, and to waive the exercise of their own extensive privileges. In the case of the King *v.* Stockdale, (*r*) the Attorney General in his speech to the jury, after stating the address of the House of Commons to the king, praying that his Majesty would direct the information to be filed, proceeded thus, "I state it as a measure which they have "taken, thinking it in their wisdom, as every one must think "it, to be the fittest to bring before a jury of their coun- "try an offender against themselves, avoiding thereby, what "sometimes indeed is unavoidable, but which they wish to "avoid whenever it can be done with propriety, the acting "both as judges and accusers, which they must necessarily "have done, had they resorted to their own powers, which "are great and extensive, for the purpose of vindicating "themselves against insult and contempt, but which in the "present instance they have wisely forborne to exercise, "thinking it better to leave the offender to be dealt with by "a fair and impartial jury." (*s*)

Of publications against the government.

VI. The extent to which the measures of the King, or the proceedings of his government, may be fairly and legally canvassed, has been the subject of much discussion, as it is undoubtedly one of the first importance; but it is not within the scope and design of this treatise to enter further upon the question, than by stating a few of the established principles and decided cases.

36 Geo. III. in consequence of a resolution of the house of commons, declaring a pamphlet, published by the defendant, to be a libel. In the pamphlet which was called "Thoughts on the English Go- "vernment," there was this passage amongst others which the house deemed libellous—"That "the king's government might go "on if the lords and commons "were lopped off." The jury considered the expressions as merely metaphorical, and acquitted the defendant.

(*r*) *Ante*, note (*q*).

(*s*) See 2 Ridgway's Speeches of the Hon. T. Erskine, p. 208.

It may be observed, that the liberty of discussion which in many instances has been admitted on the part of the officers of the crown, would seem to be sufficient to answer all the purposes of the honest patriot;—the man who would condemn only with a view to genuine and constitutional reformation. Upon a late prosecution for a libel the attorney general, in his opening to the jury, thus expressed himself: "The right of every man to represent what he "may conceive to be an abuse or grievance in the govern- "ment of the country, if his intention in so doing be honest, "and the statement made upon fair and open grounds, can "never for a moment be questioned. I shall never think it "my duty to prosecute any person for writing, printing, and "publishing, fair and candid opinions on the system of the "government and constitution of this country, nor for "pointing out what he may honestly conceive to be griev- "ances, nor for proposing legal means of redress." (*t*)

In many cases which may occur the due exercise of this liberty and right of discussion will involve considerations of much difficulty, and require great nicety of discrimination; as it may become necessary to ascertain the particular points at which the bounds of rational discussion have been exceeded. The answer to the following question has however been proposed as a test, by which the intrinsic illegality of such publications may be decided: (*u*) "Has the "communication a plain tendency to produce public mis- "chief by perverting the mind of the subject, and creating "a general dissatisfaction towards government?"

However innocent and allowable it may be to canvass political measures within these limits, it is quite clear that their discussion must not be made a cloak for an attack upon private character. Libels on persons employed in a public

(*t*) Rex *v.* Perry and another, 1793. See 2 Ridgway's Speeches, 371.

(*u*) Starkie on Lib. 525.

capacity receive an aggravation as they tend to scandalize the government by reflecting on those who are entrusted with the administration of public affairs; for they not only endanger the public peace, as all other libels do, by stirring up the parties immediately concerned to acts of revenge, but also have a direct tendency to breed in the people a dislike of their governors, and incline them to faction and sedition. (*w*)

Cases.

A person delivered a ticket up to the minister after sermon, wherein he desired him to take notice that offences passed now without controul from the civil magistrate, and to quicken the civil magistrate to do his duty, &c.; and this was held to be a libel, though no magistrates in particular were mentioned, and though it was not averred that the magistrates suffered those vices knowingly. (*x*)

Reg. *v.* Tuchin.

In a case where the defendant was prosecuted upon an information for a libel upon the government, his counsel contended that the publication was innocent and could not be considered as libellous, because it did not reflect upon particular persons. But Holt, C. J. said, "They say no-"thing is a libel but what reflects on some particular per-"son. But this is a very strange doctrine to say that it is "not a libel, reflecting on the government; endeavouring to "possess the people that the government is mal-adminis-"tered by corrupt persons that are employed in such sta-"tions, either in the navy or army. To say that corrupt "officers are appointed to administer affairs is certainly a "reflection on the government. If men should not be "called to account for possessing the people with an ill "opinion of the government, no government can subsist; "nothing can be worse to any government than to endea-

(*w*) 1 awk. P. C. c. 73. s. 7. 4 Bac. Abr. *Libel* (A) 2. p. 450. Rex *v.* Franklin, 9 St. Tri. 255.

(*x*) 4 Bac. Abr. *Libel* (A) 2. p. 451.

" vour to procure animosities as to the management of it;
" this has always been looked upon as a crime, and no
" government can be safe unless it be punished." (*y*)

This doctrine was recognized in a more modern case, where the defendant was charged with publishing a libel upon the administration of the Irish government, and upon the public conduct and character of the lord lieutenant and lord chancellor of Ireland. Lord Ellenborough, C. J. in his address to the jury observed, " It is no new doctrine " that if a publication be calculated to alienate the affec- " tions of the people, by bringing the government into dis- " esteem, whether the expedient be by ridicule or obloquy, " the person so conducting himself is exposed to the inflic- " tions of the law. It is a crime; it has ever been consi- " dered as a crime, whether wrapt in one form or another. " The case of Reg. *v.* Tuchin, decided in the time of lord " chief justice Holt, has removed all ambiguity from this " question; and although at the period when that case was " decided great political contentions existed, the matter " was not again brought before the judges of the court by " any application for a new trial." And afterwards his lordship said, " It has been observed, that it is the right of " the British subject to exhibit the folly or imbecility of the " members of the government. But, gentlemen, we must " confine ourselves within limits. If in so doing individual " feelings are violated, there the line of interdiction be- " gins, and the offence becomes the subject of penal visita- " tion." (*z*) Rex *v.* Cobbett.

VII. As nothing tends more to the disturbance of the public weal than aspersions upon the administration of justice; contempts against the king's judges, and scandalous reflections upon their proceedings, have always been consi- Of publications against magistrates and the administration of justice.

(*y*) Reg. *v.* Tuchin, 1704. Holt's R. 424. 5 St. Tri. 532.

(*z*) Rex *v.* Cobbett, 1804. Holt on Lib. 114, 115. Starkie on Lib. 529, 530. where see in the note other cases referred to.

dered as highly criminal offences; and one of the earliest cases of libel appears to have been an indictment for an offence of this kind. (*a*)

Generally, any contemptuous or contumacious words spoken to the judges of any courts in the execution of their offices are indictable; and when reflecting words are spoken of the judges of the superior courts at Westminster, the speaker is indictable both at common law and under the statutes of Scandalum Magnatum, whether the words relate to their office or not. (*b*)

Cases.

Any publications reflecting upon, and calumniating, the administration of justice, are without doubt of a libellous nature; and where a libel was published in a newspaper, in the form of an advertisement, reflecting on the proceedings of a court of justice, it was characterized as a reproach to the justice of the nation, a thing insufferable, and a contempt of court. (*c*) So an order made by a corporation and entered in their books stating that A. (against whom a jury had found a verdict with large damages in an action for a malicious prosecution, and which verdict had been confirmed in the court of Common Pleas,) was actuated by motives of public justice in preferring the indictment, was held to be a libel reflecting on the administration of justice, for which an information should be granted against the members who had made the order. Ashhurst, J. said, that the assertion that A. was actuated by motives of public justice

Rex v. Watson and others.

(*a*) Holt on Lib. 153.

(*b*) Starkie on Lib. 533. where see the cases collected. And see 1 Hawk. c. 21. s. 7. *et sequ.* The proceeding by writ of *scandalum magnatum* upon the statutes 3 Edw. I. c. 34. 2 R. II. st. 1. c. 5. 12 R. II. c. 11. is of a civil, as well as of a criminal nature, and was formerly had recourse to in case of defamation of any of the great officers and nobles. But the civil proceeding is now almost obsolete, the nobility preferring to wave their privileges in any action of slander, and to stand upon the same footing, with respect to civil remedies, as their fellow subjects.

(*c*) Vin. Abr. *Contempt* (A) 44 Pool *v.* Sacheverel 1720.

carried with it an imputation on the public justice of the country; for if those were his only motives, then the verdict must be wrong. Buller, J. said, "Nothing can be of "greater importance to the welfare of the public than to "put a stop to the animadversions and censures which are "so frequently made on courts of justice in this country. "They can be of no service, and may be attended with the "most mischievous consequences. Cases may happen in "which the judge and jury may be mistaken; when they "are, the law has afforded a remedy; and the party injured "is entitled to pursue every method which the law allows "to correct the mistake. But when a person has recourse "either by a writing like the present, by publications in "print, or by any other means, to calumniate the proceed-"ings of a court of justice, the obvious tendency of it is to "weaken the administration of justice, and in consequence "to sap the very foundation of the constitution itself." (*d*)

In a late case the same doctrine was acted upon; but it was at the same time clearly admitted that it would be lawful to discuss the merits of the verdict of a jury, or the decisions of a judge, provided it be done with candour and decency. An information was filed against the defendants, the proprietors and printers of a Sunday newspaper, for a libel upon Le Blanc, J. and a jury, by whom a prisoner had been tried for murder and acquitted; and it was contended on the part of the defendants that they had only made a fair use of their right to canvass the proceedings of a court of justice. Grose, J. said, that "it certainly was lawful, with "decency and candour, to discuss the propriety of the ver-"dict of a jury, or the decisions of a judge; and if the de-"fendants should be thought to have done no more in this "instance, they would be entitled to an acquittal: but, on "the contrary, they had transgressed the law, and ought to "be convicted, if the extracts from the newspaper, set out in "the information, contained no reasoning or discussion, but

Rex *v.* White and another.

(*d*) Rex *v.* Watson and others, 2 T. R. 199.

" only declamation and invective, and were written not " with a view to elucidate the truth, but to injure the cha- " racters of individuals, and to bring into hatred and con- " tempt the administration of justice in the country. (*e*)

Of words spoken of, or to, inferior magistrates.

It seems that no indictment will lie for contemptuous words spoken either of or to inferior magistrates, unless they are at the time in the actual execution of their duty, or at least unless the words affect them directly in their office; though it may be good cause for binding the offender to his good behaviour. (*f*) This doctrine was recognized in a modern case where the defendant was indicted for saying of a justice of the peace for the county of Middlesex, in his absence, that he was *a scoundrel and a liar*. (*g*) Lord Ellenborough, C. J. said, " the words not being spoken *to* the " justice, I think they are not indictable. This doctrine is " laid down by Lord Holt in a case in Salkeld; (*h*) and in " Rex *v.* Pocock in Strange, (*i*) the court of King's Bench " refused to grant an information for saying of a justice, in " his absence, that he was a *forsworn rogue*. However, I " will not direct an acquittal upon this point, as it is upon " the record, and may be taken advantage of in arrest of " judgment. It will be for the jury now to say whether " these words were spoken of the prosecutor as a justice of " the peace, and with intent to defame him in that capacity; " for if they were not, this indictment is not supported, and " it could not by possibility be a misdemeanor to utter them, " although the prosecutor's name may be in the commission " of the peace for the county of Middlesex." (*k*) But it has been holden to be an indictable offence to say of a justice

(*e*) Rex *v.* White and another, 1808, 1 Campb. 359. The defendants were found guilty. And see a note of another proceeding by information against the same defendants for a libel on Lord Ellenborough, C. J. Holt on Lib. 170, 171.

(*f*) Starkie on Lib. 533. 1 Hawk. P. C. c. 21. s. 13.

(*g*) Rex *v.* Weltje, 2 Campb. 142.

(*h*) Rex *v.* Wrightson, 2 Salk. 698.

(*i*) 2 Str. 1157. And see Rex *v.* Penny, 1 Lord Raym. 153.

(*k*) Rex *v.* Weltje, 2 Campb. 143.

of the peace, when *in the execution of his office*, "you are a rogue and a liar." (*l*)

Of publications against private individuals.

VIII. As every person desires to appear agreeable in life, and must be highly provoked by such ridiculous representations of him as tend to lessen him in the esteem of the world, and take away his reputation, which to some men is more dear than life itself; it has been held that not only charges of a flagrant nature, and which reflect a moral turpitude on the party, are libellous, but also such as set him in a scurrilous ignominious light, whether expressed in printing or writing, or by signs or pictures; for these equally create ill blood, and provoke the parties to acts of revenge and breaches of the peace. (*m*)

Words spoken are not indictable.

But it should be observed, that there is an important distinction under this head between words *spoken* only, and words published by writing or printing. Words spoken, however scurrilous, even though spoken personally to an individual, are not the subject of indictment, unless they directly tend to a breach of the peace, as if they convey a challenge to fight. (*n*) But words, though not scandalous

(*l*) Rex *v.* Revel, 1 Str. 420.

(*m*) *Ante*, p. 303. 4 Bac. Abr. *Libel*, (A) 2. p. 450. So in the late case of Thorley *v.* Lord Kerry, 4 Taunt. 364, Mansfield, C. J. delivering the opinion of the court said, "there is no doubt this is a "libel for which the plaintiff in "error might have been indicted "and punished, because, though "the words impute no punishable "crimes, they contain that sort of "imputation which is calculated "to vilify a man, and bring him, "as the books say, into hatred, "contempt, and ridicule; for all "words of that description an in-"dictment lies." And in Rex *v.* Cobbett, Holt on Lib. 114, 115. Lord Ellenborough, C. J. said, "No man has a right to render "the person or abilities of ano-"ther ridiculous, not only in pub-"lications; but if the peace and "welfare of individuals, or of so-"ciety, be interrupted, or even "exposed by types and figures, "the act, by the law of England, "is a libel."

(*n*) Reg. *v.* Langley, 6 Mod. 125. Rex *v.* Bear, 2 Salk. 417. By Holt C. J. Villars *v.* Monsley, 2 Wils. 403. and see Starkie on Lib. 548. In Thorley *v.* Lord

in themselves, if published in writing, and tending in any degree to the discredit of a man, have been held to be libellous. (*o*)

Cases.

Upon these principles it has been held to be libellous to write of a man that he had the itch, and stunk of brimstone. (*p*) And an information was granted against the mayor of a town for sending to a nobleman a licence to keep a public house. (*q*) An information also was granted for a publication reflecting upon a person who had been unsuccessful in a lawsuit; (*r*) and against the printer of a newspaper for publishing a ludicrous paragraph, giving an account of the marriage of a nobleman with an actress, and of his appearing with her in the boxes with jewels, &c. (*s*) A defendant was convicted for publishing a libel in a review, tending to traduce, vilify, and ridicule, an officer of high rank in the navy, and to insinuate that he wanted courage and veracity, and to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. (*t*) And an information was lately granted against a printer of a

Kerry, 4 Taunt. 355. (in the Exchequer chamber) it was held, that an action may be maintained for words written for which an action could not be maintained if they were merely spoken. Mansfield, C. J. stated the arguments which would have prevailed in his mind to repudiate the distinction between written and spoken scandal, but that the distinction had been established by some of the greatest names known to the law, Lord Hardwicke, Hale, Holt, and others; and that Lord Hardwicke, C. J. had especially laid it down, that an action for a libel may be brought on words written when the words, if spoken, would not sustain it.

(*o*) 4 Bac. Abr. *Libel*, (A) 2. pl. 450.

(*p*) Villars *v.* Monsley, 2 Wils. 403. The libel, the material part of which is stated in the text, was in rhime, and very abusive.

(*q*) The mayor of Northampton's case, 1 Str. 422.

(*r*) 2 Barnard. 84.

(*s*) Rex *v.* Kinnersley, 1 Blac. R. 294. It was sworn, that the nobleman was a married man; and the court said, that under such circumstances the publication would have been a high offence even against a commoner, and that it was high time to stop such intermeddling in private families.

(*t*) Rex *v.* Dr. Smollett, 1759. Holt on Lib. 224.

newspaper, for publishing a paragraph containing a libel on the bishop of Derry, by representing him as a bankrupt. (*u*) But in an action on the case for publishing a libel by posting it on a paper in the Casino room at Southwold, containing these words, "The Rev. John Robinson and Mr. "James Robinson, inhabitants of this town, not being per- "sons that the proprietors and annual subscribers think it "proper to associate with, are excluded this room;" the court of Exchequer held, that the publication was not a libel, as it did not affect the moral character of the plaintiffs, nor state that they were not proper persons for general society; that the paper might import no more than that the plaintiff was not a social and agreeable character in the intercourse of common life. (*w*)

Publication reflecting upon a man in respect of his trade.

A publication reflecting upon a man in respect of his trade may also be libellous; as where A. a gunsmith, published in an advertisement that he had invented a short kind of gun, that shot as far as others of a longer size, and that he was gunsmith to the prince of Wales; and B. another gunsmith counter-advertised, "That whereas, &c. (reciting "the former advertisement) he desired all gentlemen to be "cautious, for that the said A. durst not engage with any "artist in town, nor ever did make such an experiment, "except out of a leather gun, as any gentleman might be "satisfied at the Cross Guns in Long Acre, the said B.'s "house." The court held, that though B. or any other of the trade might counter-advertise what was published by A.

(*u*) Rex *v.* ——, Hil. T. 1812. Though it is not the object of this work to treat of the practice and modes of proceeding in criminal prosecutions, it may be proper shortly to observe, that the court of King's Bench always exercises a discretionary power in granting an information for a libel, and will, in many cases, leave the party to his ordinary remedy: as where the application is made after a great length of time, or where the matter complained of as a libel happens to be true. See 4 Bac. Abr. *Libel*. 2. p. 451. and Starkie on Lib. 590. *et sequ.*

(*w*) Robinson *v.* Jermyn and others, 1 Price R. 11.

yet it should have been done without any general reflections on him in the way of his business: that the advice to "all "gentlemen to be cautious," was a reflection upon his honesty; and the allegation that he would not engage with an artist was setting him below the rest of his trade, and calling him a bungler in general terms; and that the expression "except out of a leather gun" was charging him with a lie, the word gun being vulgarly used for a lie, and gunner for a liar, and that therefore these words were libellous. (*x*)

General imputations upon a body of men are indictable.

General imputations upon a body of men are indictable, though no individuals may be pointed out. (*y*) An information was prayed against the defendant for publishing a paper containing an account of a murder committed upon a Jewish woman and her child, by certain *Jews* lately arrived from Portugal, and living near Broad Street, because the child was begotten by a Christian. (*z*) It was objected that no information should be granted in this case, because it did not appear who in particular the persons reflected on were. (*a*) But the court said, that admitting that an information for a libel may be improper, yet the publication of this paper is deservedly punishable in an information for a misdemeanor, and that of the highest kind; such sort of advertisements necessarily tending to raise tumults and disorders amongst the people, and inflame them with an universal spirit of barbarity against a whole body of men, as if guilty of crimes scarcely practicable, and wholly incredible. (*b*) And if some of the individuals affected by the

(*x*) Harman *v.* Delany, Barnard. K. B. 289. Fitzgib. 121. 2 Str. 898. S. C.

(*y*) Ante, p. 305.

(*z*) The affidavit set forth that several persons therein mentioned, who were recently arrived from Portugal, and lived in Broad-street, were attacked by multitudes in several parts of the city, barbarously treated, and threatened with death, in case they were found abroad any more.

(*a*) Rex *v.* Orme, 3 Salk. 224. pl. 5. 1 Lord Raym. 486. was cited.

(*b*) Rex *v.* Osborne, Sess. Cas. 260. 2 Barnard. 138. 166. Kel. 230. pl. 183.

libel are specified, it will be sufficient; as where it was objected that the names of certain trustees, who were part of the body prosecuting, were not mentioned, Lord Hardwicke observed, that though there were authorities where, in cases of libel upon persons in their private capacities, it had been holden necessary that some particular person should be named, this was never carried so far as to make it necessary that every person injured by such libel should be specified. (*c*)

Libel upon a person deceased.

A malicious defamation of one who is dead, if published with a malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, will be libellous; but it has been holden that an indictment for a libel, reflecting on the memory of a deceased person, cannot be supported, unless it state that it was done with a design to bring contempt on his family, or to stir up the hatred of the king's subjects against his relations, and to induce them to break the peace in vindicating the honour of the family. (*d*)

Exceptions to the general rules.

But there are some exceptions to the general rules and doctrine concerning libels, in the case of comments upon literary productions, and also in the case of communications considered as confidential, or made *bonâ fide* with a view of investigating a fact, or in the regular and proper course of a proceeding.

Comments upon literary productions.

A publication commenting upon a literary work, exposing its follies and errors, and holding up the author to ridicule, will not be deemed a libel, provided such comment does not exceed the limits of fair and candid criticism, by attacking the character of the writer, unconnected with his publication; and every one has a right to publish a comment of this description. (*e*) But if a person under the

(*c*) Rex *v.* Griffin and others, Holt on Lib. 239.

(*d*) Rex *v.* Topham, 4 T. R. 126.

(*e*) Carr *v.* Hood, 1 Campb. 355.

pretence of criticising a literary work, defames the private character of the author, and, instead of writing in the spirit, and for the purpose of fair and candid discussion, travels into collateral matter, and introduces facts not stated in the work, accompanied with injurious comments upon them, such person is a libeller. (*f*) A fair and candid comment on a place of public entertainment, in a newspaper, is not a libel. (*g*)

Confidential communications.

Confidential communications are in some cases privileged. As where it was holden that a letter written confidentially to persons who employed A. as their solicitor, conveying charges injurious to his professional character in the management of certain concerns, which they had entrusted to him, and in which B. the writer of the letter was likewise interested, was not a libel. (*h*) And if a person, in a private letter to the party, should expostulate with him about some vices, of which he apprehends him to be guilty, and desire him to refrain from them; or if a person should send such a letter to a father, in relation to some faults of his children; these it seems would not be considered as libellous, but as acts of friendship, not designed for defamation but reformation. (*i*) But this doctrine must be applied with

And in action for a libel upon the plaintiff in his business of a bookseller, accusing him of being in the habit of publishing immoral and foolish books, the defendant, under the plea of not guilty, may adduce evidence to shew that the supposed libel is a fair stricture upon the general run of the plaintiff's publications. Tabart *v.* Tipper, 1 Campb. 350.

(*f*) Nightingale *v.* Stockdale, 49 Geo. III. *cor.* Ellenborough, C. J. Selw N. P. 1014. And it was held that though it is lawful to animadvert upon the conduct of a bookseller in publishing books of an improper tendency, it is actionable *falsely* to impute to him the publication of any immoral or absurd literary production. Tabart *v.* Tipper, 1 Campb. 354.

(*g*) Dibdin *v.* Swan, 1 Esp. N. P. C. 28. and see also Ashley *v.* Harrison, 1 Esp. N. P. C. 48. Peake N. P. C. 194.

(*h*) M'Dougall *v.* Claridge, 1 Campb. 267.

(*i*) Peacock *v.* Sir George Reynell, 2 Brownl. 151, 152. 4 Bac. Abr. *Libel* (A) 2. in the notes p. 452.

some caution; since the sending an abusive letter filled with provoking language to another, is an offence of a public nature, and punishable as such, inasmuch as it tends to create ill blood and cause a disturbance of the public peace; (*k*) and the reason assigned by lord Bacon, why such private letter should be punishable, seems to be a very sufficient one, namely, that it enforces the party to whom the letter is directed, to publish it to his friends, and thus induces a compulsory publication. (*l*) And though a letter written by a master, in giving a character of a servant, will not be libellous, unless its contents be not only false but malicious; (*m*) yet in such a case malice may be inferred from the circumstances. (*n*)

Communications made *bonâ fide*, or with a view of investigating a fact.

Although that which is written may be injurious to the character of another, yet if done *bonâ fide*, or with a view of investigating a fact, in which the party making it is interested, it is not libellous. Thus where an advertisement was published by the defendant at the instigation of A. the plaintiff's wife, for the purpose of ascertaining whether the plaintiff had another wife living when he married A.; it was holden that although the advertisement might impute bigamy to the plaintiff, yet having been published under such authority, and with such a view, it was not libellous. (*o*) And if the communication be made in the regular and proper course of a proceeding, it will not be libellous. As where a writing, containing the defendant's case, and stating that some money, due to him from the government for furnishing the guard at *Whitehall* with fire and candle, had been improperly obtained by a captain C. was directed to a general officer, and the four principal officers of the

Or made in the proper course of a proceeding.

(*k*) 4 Bac. Abr. *Libel* (B) 2. p. 459. Rex *v.* Cator, 2 East. R. 361. Thorley *v.* Lord Kerry, 4 Taunt. 355. In the last case the letter was unsealed and opened and read by the bearer.

(*l*) Poph. 189, cited in Holt on Lib. 222.

(*m*) Weatherstone *v.* Hawkins, 1 T. R. 110. Edmonson *v.* Stephenson, Bull. N. P. 8.

(*n*) Rogers *v.* Sir G. Clifton, 3 Bos. & Pul. 587.

(*o*) Delaney *v.* Jones, 4 Esp. 191.

guards, to be presented to his Majesty for redress; an information was refused on the ground that the writing was no libel, but a representation of an injury drawn up in a proper way for redress, without any intention to asperse the prosecutor; and that though there was a suggestion of fraud, yet that is no more than is contained in every bill in chancery, which is never held libellous if relative to the subject matter. (*p*) And where the defendant, being deputy governor of Greenwich hospital, wrote a large volume, containing an account of the abuses of the hospital, and treating the characters of many of the officers of the hospital (who were *public* officers), and lord Sandwich in particular, who was first lord of the Admiralty, with much asperity; and printed several copies of it, which he distributed to the governors of the hospital only, and not to any other person; the rule for an information was discharged. Lord Mansfield said, that this distribution of the copies to the persons only who were from their situations called on to redress these grievances, and had, from their situations, competent power to do it, was not a publication sufficient to make the writing a libel. (*q*) And where the publication is an admonition, or in the course of the discipline of a religious sect, as the sentence of expulsion from a society of Quakers, it is not libellous. (*r*) And it has been decided that an action will not lie for words innocently read as a story out of a book, however false and defamatory they may be. Thus where a clergyman in a sermon recited a story out of *Fox's Martyrology*, that one G. being a perjured person, and a great persecutor, had great plagues inflicted upon him, and was killed by the hand of God; whereas in truth he never was so plagued, and was himself actually present at the

(*p*) Rex *v.* Bayley, Andr. 229. 4 Bac. Abr. *Libel* A. 2. p. 452. As to the privilege of proceedings in courts of justice, see *ante*, p. 268.

(*q*) Rex *v.* Baillie, 30 Geo. III. Holt on Lib 173. 1 Ridgway's collection of Erskine's Speeches, p. 1. Lord Mansfield seemed to think that whether the paper were in manuscript or printed, under these circumstances, made no difference.

(*r*) Rex *v.* Hart, 2 Burn's Ecc. L. 779.

discourse; the words being delivered only as matter of history, and not with any intention to slander, it was adjudged for the defendant. (*s*)

Of publications against foreigners of distinction.

IX. Upon the ground that malicious and scurrilous reflections upon those who are possessed of rank and influence in foreign states may tend to involve this country in disputes and warfare, it has been held that publications tending to degrade and defame persons in considerable situations of power and dignity in foreign countries may be treated as libels. Thus an information was filed, by the command of the crown, for a libel on a French ambassador, then residing at the British court, consisting principally of some angry reflections on his public conduct, and charging him with ignorance in his official capacity, and with having used stratagem to supplant and depreciate the defendant at the court of Versailles. (*t*) And lord George Gordon was found guilty upon an information for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction: upon which occasion Ashhurst, J. observed, in passing sentence, that the object of the publication being to rekindle animosities between England and France by the personal abuse of the sovereign of one of them, it was highly necessary to repress an offence of so dangerous a nature; and that such libels might be supposed to have been made with the connivance of the state where they were published, unless the authors were subjected to punishment. (*u*) So a defendant was found guilty upon an information charging him with having published the following libel: "The Emperor of Russia "is rendering himself obnoxious to his subjects by various "acts of tyranny, and ridiculous in the eyes of Europe by "this inconsistency. He has lately passed an edict to pro-"hibit the exportation of deals and other naval stores. In

(*s*) 4 Bac. Abr. *Libel* A. 2. p. 452.

(*t*) Rex *v.* D'Eon, 1 Blac. Rep. 510. The defendant was convicted.

(*u*) Rex *v.* Lord George Gordon, 1787.

" consequence of this ill-judged law, a hundred sail of vessels " are likely to return to this country without freight." (*w*)

And in a case which occurred shortly afterwards, where the defendant was charged by an information with a libel upon Napoleon Buonaparte, Lord Ellenborough, C. J. in his address to the jury, said, " I lay it down as law that any " publication which tends to degrade, revile, and defame, " persons in considerable situations of power and dignity in " foreign countries, may be taken to be, and treated as a " libel; and particularly when it has a tendency to interrupt " the pacific relations between the two countries." (*x*)

Of the evidence on a prosecution for a libel.

Having stated the different sorts of publications for which a party may be found guilty of libel, we may mention some of the points relating to the evidence on a prosecution for this offence.

Of the making and publication of a libel.

If one man repeats a libel, another writes it, and a third approves what is written, they will all be makers of the libel; and it may be laid down generally that all who are concerned in composing, writing, and publishing a libel are guilty of the misdemeanor, unless the part they had in the transaction was a lawful or an innocent act. (*y*) But there must be a publication; and the mere writing or composing a defamatory paper by any one, which is confined to his closet, and neither circulated nor read to others, will not render him responsible; nor will he be held to have published the paper if he deliver it by mistake out of his study. (*z*) And it will not be a publication of a libel if a party takes a copy of it, provided he never publishes it; (*a*)

(*w*) Rex *v.* Vint, 1801.

(*x*) Rex *v.* Peltier, 43 Geo. III. Holt on Lib. 78. *et sequ.* Starkie on Lib. 541, 542. The defendant was convicted, but never was called upon to receive the judgment of the court. Shortly after the trial war broke out between Great Britain and France.

(*y*) 4 Bac. Abr. *Libel* (B). 1. p. 457.

(*z*) Rex *v.* Paine, 5 Mod. 165. 167.

(*a*) Com. Dig. *Libel*, (B. 2.) Lamb's case, 9 Co. 596.

but a person who appears once to have written a libel, which is afterwards published, will be considered as the maker of it, unless he rebut the presumption of law by shewing another to be the author, or prove the act to be innocent in himself. (*b*) For by Holt, C. J. if a libel appears under a man's hand-writing, and no other author is known, he is taken in the manner, and it turns the proof upon him; and if he cannot produce the composer, it is hard to find that he is not the very man. (*c*)

The reading of a libel in the presence of another, without previous knowledge of its being a libel, or the laughing at a libel read by another, or the saying that such a libel is made by I. S. whether spoken with or without malice, does not amount to a publication. And it has also been held, that he who repeats part of a libel in merriment, without any malice or purpose of defamation, is not punishable; though this has been doubted. (*d*) But it seems to have been agreed that if he who hath either read a libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any part of it in the presence of others, or lend or shew it to another, he is guilty of an unlawful publication of it. (*e*) In a late case, however, of an action for a libel contained in a caricature print, where the witness stated, that having heard

(*b*) 4 Bac. Abr. *Libel* (B) 1. p. 457. Lamb's case, 9 Co. 59. The writing a libel may be an innocent act, in the clerk who draws the indictment, or in the student who takes notes of it. But in a late case (Maloney *v.* Bartley, 3 Campb. 210.) Wood, B. held, on the trial of an action for a libel, in the shape of an *extra-judicial* affidavit sworn before a magistrate, that a person who acted as the magistrate's clerk was not bound to answer whether by the defendant's orders he wrote the affidavit and delivered it to the magistrate, as he might thereby criminate himself

(*c*) Rex *v.* Beare, 1 Lord Raym. 417. 2 Salk. 417.

(*d*) 4 Bac. Abr. *Libel* (B) 2. p. 458. This is doubted in 1 Hawkins, P. C. c. 73. s. 14. on the ground that jests of such a kind are not to be endured, and that the injury to the reputation of the party grieved is no way lessened by the merriment of him who makes so light of it.

(*e*) 4 Bac. Abr. *Libel*, (B) 2. p. 458.

that the defendant had a copy of this print he went to his house and requested liberty to see it, and that the defendant thereupon produced it, and pointed out the figure of the plaintiff and the other persons it ridiculed, Lord Ellenborough, C. J. ruled, that this was not sufficient evidence of publication to support the action. (*f*)

Proof that the libel was contained in a letter directed to the plaintiff, and delivered into the plaintiff's hands, is sufficient proof of a publication upon an indictment or information. (*g*)

Acknowledgment of the defendant.

In an information for a libel against the doctrine of the Trinity, the witness for the crown, who produced the libel, swore that it was shewn to the defendant, who owned himself the author of that book, *errors of the press and some small variations excepted.* The counsel for the defendant objected that this evidence would not entitle the attorney-general to read the book, because the confession was not absolute, and therefore amounted to a denial that he was the author of that identical book. But Pratt, C. J. allowed it to be read, saying he would put it upon the defendant to shew that there were material variances. (*h*)

Procuring another to publish is a a publication.

It seems to be agreed, that not only he who publishes a libel himself, but also he who procures another to do it, is guilty of the publication; and it is held not to be material whether he who disperses a libel knew any thing of the contents or effects of it or not, for that nothing would be more easy than to publish the most virulent papers with the great-

(*f*) Smith *v.* Wood, 3 Campb. 323. And see Rex *v.* Paine, 5 Mod. 165. where a *qu.* is made in the margin whether a person who has a libellous writing in his possession, and reads it to a private friend in his own house, is thereby guilty of *publishing* it.

(*g*) 1 Hawk. P. C. c. 73. s. 11. 4 Bac. Abr. *Libel*, (B) 2. p. 459. *Ante*, p. 331. Selw. N. P. 1050. n. (9).

(*h*) Rex *v.* Hall, 1 Str. 416.

est security if the concealing the purport of them from an illiterate publisher would make him safe in dispersing them. (*i*)

Publication by booksellers and proprietors of newspapers.

Upon this foundation it has for a long time been held that the buying of a book or paper, containing libellous matter, in a bookseller's shop is sufficient evidence to charge the master with the publication, although it does not appear that he knew of any such book being there, or what the contents thereof were; and it will not be presumed that it was bought and sold there by a stranger; but the master must, if he suggests any thing of this kind in his excuse, prove it. (*k*) So the proprietor of a newspaper is answerable criminally as well as civilly for the acts of his servants in the publication of a libel, although it can be shewn that such publication was without the privity of the proprietor. (*l*)

38 Geo. III. c. 78. facilitates proceedings against printers, &c. of newspapers.

The proceedings against the printers, publishers, and proprietors of newspapers for any libel contained in such papers are much facilitated by the statute 38 Geo. III. c. 78. which

(*i*) 4 Bac. Abr. *Libel*, (B) 2. p. 458. 1 Hawk. P. C. c. 73. s. 10.

(*k*) 4 Bac. Abr. *Libel*, (B) 2. p. 458. citing Rex *v.* Nutt, by Raym. C. J. Fitzgib. 47. Barnard. K. B. 306. 2 Sess. Cas. 33. pl. 38. And see also Rex *v.* Almon, 5 Burr. 2686. And by Lord Hardwicke, in 2 Atk. 472. "Though printing papers and "pamphlets is a trade by which "persons get their livelihood, yet "they must take care to use it "with prudence and caution: for "if they print any thing that is "libellous, it is no excuse to say "that the printer had no know-"ledge of the contents, and was "entirely ignorant of its being li-"bellous."

(*l*) Rex *v.* Walter, 3 Esp. N. P. C. 21. And in Rex *v.* Dod, 2 Sess. Cas. 33. pl. 38. Lord Raym. C. J. said, it had been ruled, that where a master lived out of town and his trade was carried on by his servant, the master would be chargeable if his servant should publish a libel in his absence. In 1 Hawk. P. C. c. 73. s. 10. (edit. 7) is the following marginal note:—"But if a printer is "confined in a prison to which his "servants have no access, and they "publish a libel without his pri-"vity, the publication of it shall "not be imputed to him. Wood "fall's case, Essay on Libels, p. 18. "Sed vide Salmon's case, B. R. "Hil. 1777, and Rex *v.* Almon, 5 "Burr. 2687."

enacts, that no person shall print or publish any newspaper until an affidavit, or affirmation in case of a Quaker, shall have been delivered at the stamp office, setting forth the names, additions, &c. of the printer, publisher, and of two of the proprietors; (*m*) that such affidavit or affirmation shall be filed, and the same, or certified copies thereof, shall in all proceedings, civil and criminal, touching any newspaper therein mentioned, be received as conclusive evidence of the truth of the matters contained in such affidavit or affirmation against the persons swearing, who shall have signed and sworn or affirmed them, and against proprietors named therein as proprietors, &c. but who shall not have signed, &c. unless such persons shall have delivered to the commissioners, previously to the date of the newspaper in question, an affidavit or affirmation of their having ceased to be printers, &c. of such paper.

s. 11. After production of the affidavit or copy, and a paper intituled as therein

The eleventh section enacts, that after any such affidavit or affirmation, or a certified copy thereof, shall have been produced in evidence against the persons who signed, &c. or are therein named, and after a newspaper shall be pro-

(*m*) The substance of s. 2. *et sequ.* is, that the affidavit or affirmation shall set forth the real and true names, additions, descriptions, and places of abode of the printer, publisher, and of all the proprietors, if they do not exceed two, exclusively of printer and publisher; if they do, then of two such proprietors, exclusively of printer and publisher; specifying the amount of shares, the true description of the house or building wherein such paper is intended to be printed, and the title of such paper. If the proprietors exceed two, then two whose proportional shares in the property shall not be less than the proportional share of any other proprietor, exclusively of printer and publisher, shall be named and described in the affidavit or affirmation. This affidavit or affirmation must be renewed as often as the printer, &c. shall change their abode or printing office, or as often as commissioners for stamp duties shall require. It must be signed by the parties making it, and taken by a commissioner or person specially appointed by commissioners. And it must be sworn by all the parties, if they do not exceed four; if they do, then by four, who shall give notice to the other parties not swearing, under a penalty of 50*l.*

duced in evidence intituled in the same manner as the newspaper mentioned in such affidavit or copy, and wherein the name of the printer, &c. and the place of printing shall be the same, it shall not be necessary for the prosecutor to prove that the newspaper to which such trial relates was purchased at any house, &c. belonging to or occupied by the defendants or their servants, &c. or where they by themselves or their servants, &c. usually carry on the business of printing or publishing such paper, or where the same is usually sold.

mentioned, &c. it shall not be necessary to prove the purchase of the paper.

The thirteenth section enacts, that a certified copy of any such affidavit or affirmation shall be delivered to the person applying for the same, by the commissioners or officers by whom they shall be kept, on payment of one shilling. The fourteenth section enacts, "that in all cases a copy of such "affidavit or affirmation certified to be a true copy, under "the hand or hands of one or more of the commissioners or "officers in whose possession the same shall be, shall, upon "proof made that such certificates have been signed with "the handwriting of the person or persons making the "same, and whom it shall not be necessary to prove to be a "commissioner or commissioners, or officer or officers, be "received in evidence as sufficient proof of such affidavit or "affirmation, and that the same was duly sworn or affirmed, "and of the contents thereof;" and that such copies shall be evidence that the affidavit or affirmation has been sworn or affirmed according to the act, and shall have the same effect for the purposes of evidence to all intents whatsoever, as if the original affidavits or affirmations had been produced in evidence.

S. 13. A certified copy to be delivered on paying 1*s*.

S. 14. Copies of affidavits, certified by the commissioners or officers in whose custody they shall be, to be sufficient evidence.

The seventeenth section provides, that every printer or publisher shall, within six days after the publication, deliver to the commissioners of stamps, at their head office, or to some officer appointed by them, one of the papers so published, signed by the printer or publisher in his hand-

S. 17. One of the newspapers to be delivered within six days to the commissioners, &c. and

within two years afterwards it may be applied for to be produced in evidence.

writing, with his name and place of abode; and in case any person shall apply to the commissioners, &c. in order that such newspaper may be produced in evidence, the said commissioners, &c. shall, at the expence of the party applying, at any time within two years from the publication, either cause the same to be produced in court, or deliver the same to the party applying, taking reasonable security for its being returned.

Construction of the statute.

Before this statute it was holden, upon an indictment for a libel in a newspaper, that evidence that the paper had been sold at the office of the defendant, that the defendant, as proprietor of the paper, had given a bond to the stamp office pursuant to the 29 Geo. III. c. 50. s. 10. for securing the duties on the advertisements, and that he had from time to time applied to the stamp office respecting the duties on the paper, was evidence to be left to the jury, to shew that the defendant was the publisher. (*n*) And since the statute, it has been held to be sufficient evidence of a publication at common law to put in the original affidavit of the proprietor stating where the paper was to be published, and to prove that a paper with a corresponding title, containing the libel, was purchased there. (*o*) This was held in a case where it had been previously ruled that in order to render the certified copy of the affidavit, made by the proprietor of a newspaper, evidence under the statute 38 Geo. III. c. 78. it must either appear upon the *jurat* that the person before whom it was made had authority to take it, or this fact must appear *aliunde*. (*p*) It has been ruled, that an affidavit according to the statute, together with the production of a newspaper, corresponding in every respect with the description of it in the affidavit, is not only evidence of the publication of such paper by the parties named, but is also evidence of its publication in the county where the printing of it is described to

(*n*) Rex v. Topham, 4 T. R. 126.
(*o*) Rex v. White, 3 Campb. 100.
(*p*) *Id.* 99.

be. (*q*) And a newspaper may be given in evidence, though it is not one of the copies published, and though it is unstamped at the time of trial. (*r*)

The libel must be produced, and must correspond with the indictment.

Upon the trial the libel must in general be produced on the part of the prosecution, and after sufficient proof of a publication by the defendant, may be read; and if the libel has merely been exhibited by the defendant, and he refuses on the trial to produce it, after notice for that purpose, parol evidence may be given of its contents. (*s*) It must appear to correspond with the statement of it in the indictment, and any variation in the sense between the matter charged and that proved will be fatal. (*t*) But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate; though the smallest variance, if it renders the meaning different, will be fatal. (*u*) The libel must also be proved to have been published in the county laid in the indictment; and it has been held that the post-mark of a particular place within the county in which the *venue* is laid, upon a letter containing the libel, is not sufficient evidence of a publication there by the defendant. (*w*) But it was held in the same case, that if a libellous letter is sent by the post, addressed to the prosecutor at a place out of the county in which the venue is laid in an indictment for the libel, yet if it was first received by him within that county, this is a sufficient publication to sup-

(*q*) Rex *v.* Hart, 10 East. 94.

(*r*) Rex *v.* Pearce, Peake's N. P. C. 75.

(*s*) By Buller, J. in Rex *v.* Watson and others, 2 T. R. 201.

(*t*) Tabart *v.* Tipper, 1 Campb. 352. And if it appears upon the proof that parts of the libel which are separated by intervening matter are set forth as if they were continuous, it will be bad, if the sense is altered by the passage omitted. *Id. Ibid.* It is settled that the whole libel need not be set forth in the indictment: but if any part qualifies the rest, it may be given in evidence, 2 Salk. 417.

(*u*) Rex *v.* Beech, 1 Leach, 133. Rex *v.* Hart, 1 Leach, 145.

(*w*) Rex *v.* Watson, 1 Campb. 215. Lord Ellenborough, C. J. held the proof of publication insufficient, as the post-mark might have been forged.

port the indictment. (*x*) It has been held to be sufficient to prove a defendant to have *published* a libel without proving him to have *composed* it, upon a count in an information charging him with having "composed, printed, and pub-"lished" it. (*y*) So if the defendant is charged by a count in an indictment with having "composed, *printed*, and pub-"lished" a libel, if the evidence be that he only composed and published it, he may be found guilty of the composing and publishing, and acquitted of the printing. (*z*)

If the libel be in a *foreign language*, as it is necessary that it should be set forth in the indictment in the original language, and also in an English translation, it will be necessary to prove the translation to be correct. Thus upon the trial of an information against the defendant for a libel in the French language on Napoleon Buonaparte, after a witness had proved the purchase of some copies of the book

(*x*) Rex *v.* Watson, 1 Campb. 215.; and see Rex *v.* Middleton, 1 Str. 77. In the case of Rex *v.* Johnson, 7 East. 65. it was held, where the publisher of a public register received an anonymous letter, tendering certain political information on Irish affairs, and requiring to know to whom letters should be directed, to which an answer was returned in the register, after which he received two letters in the same hand-writing directed as mentioned, and having the Irish post-mark on the envelopes, which two letters were proved to be in the hand-writing of the defendant, the previous letter having been destroyed, that this was a sufficient ground for the court to have the letters read; and the letters themselves containing expressions of the writer, indicative of his having sent them to the publisher of the register in Middlesex, for the purpose of publication, the whole was evidence sufficient for the jury to find a publication by the procurement of the defendant in Middlesex.

(*y*) Rex *v.* Hunt and Another, 2 Campb. 583.

(*z*) Rex *v.* Williams, 2 Campb. 646, Lawrence, J. said "There is "certainly no proof that the de-"fendant *printed* the libel in ques-"tion; but he may be acquitted "of the printing, and found guilty "of the composing and publish-"ing. His delivering the libel "in his own handwriting to the "printer is abundant evidence of "the latter offence." A verdict was accordingly found and recorded of "Guilty, except as to "printing the libel."

from a certain bookseller, and the bookseller had proved that the defendant was the publisher, and had employed him to dispose of the copies on his account, and that he had accounted for them; an interpreter was called, who swore that he understood the French language, and that the translation was correct. The interpreter then read the whole of that which was charged to be a libel in the original, and then the translation was read by the clerk at Nisi Prius. (*a*)

Depositions are not evidence; but a Gazette, the king's proclamation, and a preamble to an act of parliament, are evidence for certain purposes.

Depositions taken before a magistrate are not evidence upon a trial for a libel, the statute 1 & 2 Ph. & M. c. 13. and 2 & 3 Ph. & M. c. 10. by which such depositions are made evidence, extending only to cases of felony. (*b*) It has been held that a *Gazette* is evidence to prove an averment in an information for a libel, "that divers addresses, "&c. had been presented to his Majesty by divers of his "loving subjects." (*c*) In a recent case, *the king's proclamation*, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, was held to be admissible evidence to prove an introductory averment, in an information for a libel, that divers acts of outrage had been committed in those parts. (*d*) And a *preamble* to an act of parliament, reciting the existence of such outrages, and making provision against them, was also held to be admissible for the same purpose. (*e*)

Criminal intention of the defendant.

The criminal intention of the defendant will be matter of inference from the nature of the publication. In order to constitute a libel, the mind must be in fault, and shew a malicious intention to defame; for if published inadvertently it will not be a libel; but where a libellous publication appears, unexplained by any evidence, the jury should

(*a*) Rex *v.* Peltier, Selw. N. P. 1048.

(*b*) Rex *v.* Paine, 5 Mod. 163.

(*c*) Rex *v.* Holt, 5 T. R. 436.

(*d*) Rex *v.* Sutton, 4 M. and S. 532.

(*e*) *Id. Ibid.*

judge from the overt act; and where the publication contains a charge slanderous in its nature, should from thence infer that the intention was malicious. (*f*) In some cases, however, the paper or other matter may be libellous only with reference to circumstances which should be laid before the jury by evidence.

Defendant's evidence.

As the defendant is not allowed to prove the truth of the libellous matter in justification of his conduct, (*g*) the evidence which can be adduced on his behalf at the trial will in general be confined to a very narrow compass. There may, however, be cases of a publication in point of law, where no criminal intention can be imputed to the party; as where a person delivers a letter without knowing its contents, or delivers one paper instead of another; (*h*) and evidence to such effect may be produced. But it is not competent to the defendant to prove that a paper similar to that, for the publication of which he is prosecuted, was published on a former occasion by other persons, who have never been prosecuted for it. (*i*) It was held, in a case where the supposed libel was contained in a newspaper, that the defendant had a right to have read in evidence any extract from the same paper, connected with the subject of the passage charged as libellous, although disjoined from it by extraneous matter, and printed in a different character. (*k*) Though the defendant cannot have the assistance of counsel to examine the witnesses, and reserve to himself the right of addressing the jury; yet if he conducts his defence himself, and any point of law arises which he professes himself unable to argue, the court will hear this argued by his counsel. (*l*)

(*f*) By Lord Kenyon, C. J. in Rex *v.* Lord Abingdon, 1 Esp. 228. And see Rex *v.* Topham, 4 T. R. 127. and Rex *v.* Woodfall, 5 Burr. 2667.

(*g*) *Ante*, p. 306.

(*h*) By Lord Kenyon, C. J. in Rex *v.* Topham, 4 T. R. 127, 128. Rex *v.* Nutt. Fitz. 47. And see *ante*, p. 338. *et sequ.*

(*i*) Rex *v.* Holt, 5 T. R. 436.

(*k*) Rex *v.* Lambert and Perry, 2 Campb. 398.

(*l*) Rex *v.* White, 3 Campb. 98.

Verdict. The jury may give a general verdict upon the whole matter put in issue.

It had been held in many cases, that, on trials for libels, the facts of writing, printing, or publishing, and the truth of the innuendoes inserted in the proceedings, were the only matters to be submitted to the consideration of the jury; but the justice of such doctrine being questioned and ably arraigned, (*m*) the statute 32 Geo. III. c. 60. was passed, which enacts "that on every such trial, the jury sworn "to try the issue, may give a general verdict of guilty or "not guilty, upon the whole matter put in issue, upon such "indictment or information; and shall not be required or "directed, by the court or judge before whom such indict-"ment or information shall be tried, to find the defendant "or defendants guilty, merely on the proof of the publica-"tion by such defendant or defendants of the paper charged "to be a libel, and of the sense ascribed to the same in such "indictment or information." (*n*) But it provides also, "That the court or judge before whom such indictment or "information shall be tried, shall, according to their or his "discretion, give their or his opinion and directions to the "jury, on the matter in issue between the king and the "defendant or defendants, in like manner as in other cri-"minal cases." (*o*)

Judgment.

The judgment in cases of libel is in the discretion of the court, as in most other cases of misdemeanors; and usually consists of fine, imprisonment, and the finding sureties to keep the peace. (*p*) In some cases prior to the statute 56 Geo. III. c. 138. the offender was also sentenced to the pillory.

(*m*) See the celebrated speeches of Mr. Erskine in the case of the Dean of St. Asaph, 1 vol. of Ridgway's col. p. 234. and 264.

(*n*) S. 1.

(*o*) S. 2. By s. 3. it is provided that the jury may find a special verdict, in their discretion, as in other criminal cases. And section 4. provides that defendants may move in arrest of judgment as before the passing of the act.

(*p*) 1 Hawk. P. C. c. 73. s. 21. 4 Bac. Abr. Libel (C) p. 459. Rex *v.* Middleton, Fort. 201.

CHAPTER THE TWENTY-SIXTH.

Of Riots, Routs, and unlawful Assemblies.

THE distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make *a motion to execute;* and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute.* (*a*) These offences may be treated of more at large in the order in which they have been mentioned.

Of a riot.

I. A riot is described to be a tumultuous disturbance of the peace by *three persons or more,* assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprize of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. (*b*)

(*a*) 1 Hawk. P. C. c. 65. s. 1, 8, 9. 3 Inst 176. 4 Blac. Com. 146.

(*b*) 1 Hawk. P. C. c. 65. s. 1. *Three persons or more* is the correct description of the number of persons necessary to constitute a riotous meeting; but it should be observed, that in Hawkins (c. 65. s. 2. 5. 7.) the words "more than three persons" are three times over inserted instead of "three persons or more;" which in 5 Burn. Just. *Riot*, S. 1. is remarked as an instance that, in a variety of matter, it is impossible for the mind of man to be always equally attentive. The description of riot stated in the text, and taken from the work of Mr. Serjeant Hawkins, is submitted as that which would pro-

Where the law authorizes force an assembling will not be riotous.

In some cases, in which the law authorizes force, it is not only lawful, but also commendable, to make use of it; as for a sheriff or constable, or perhaps even for a private person to assemble a competent number of people in order with force to suppress rebels, or enemies, or rioters; and afterwards with such force actually to suppress them; or for a justice of peace, who has a just cause to fear a violent resistance, to raise the *posse*, in order to remove a force in making an entry into, or detaining of, lands. Also it seems to be the duty of a sheriff, or other minister of justice, having the execution of the king's writs, and being resisted in endeavouring to execute them, to raise such a power as may effectually enable them to overpower any such resistance; yet it is said not to be lawful for them to raise a force for the execution of a civil process, unless they find a resistance; and it is certain that they are highly punishable for using any needless outrage or violence. (*c*)

How far the object must be of a private nature.

It seems to be agreed, that the injury or grievance complained of, and intended to be revenged or remedied by a riotous assembly, must relate to some *private quarrel* only; as the inclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons, in no way concerning the public. For the proceedings of a riotous assembly on a public or general account, as to re-

bably be deemed most correct at the present time. It should be observed, however, that riot has been described differently by high authority. In Regin. *v.* Soley and others, 11 Mod. 116. Holt, C. J. said, "The books are obscure in "the definition of riots. I take it, "it is not necessary to say they as- "sembled for that purpose, but "there must be an unlawful as- "sembly: and as to what act will "make a riot, or trespass, such an "act as will make a trespass will "make a riot. If a number of men "assemble with arms, in terrorem "populi, though *no act is done*, it "is a riot. If three come out of "an ale-house, and go armed, it is "a riot."

(*c*) 1 Hawk. P. C. c. 65. s. 2. 19 Vin. Abr. *Riots, &c.* (A) 4.

dress grievances, pull down all inclosures, or to reform religion, and also resisting the king's forces, if sent to keep the peace, may amount to overt acts of high treason by levying war against the king. (*d*)

As to the degree of violence or terror.

It seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the shew of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done *in terrorem populi*. (*e*) But it is not necessary in order to constitute this crime that personal violence should have been committed. (*f*)

Upon these principles assemblies at wakes, or other festival times, or meetings for the exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. (*g*) And upon the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprize, without being rioters; as if a man assemble a number of persons

(*d*) 4 Blac. Com. 147. 1 Hawk. P. C. c. 65. s. 6.

(*e*) 1 Hawk. P. C. c. 65. s. 5.

(*f*) Per Mansfield, C. J. in Clifford v. Brandon, 2 Campb. 369.

(*g*) 1 Hawk. P. C. c. 65. s. 5. But see in 2 Chit. Crim. L. 494. an indictment said to have been drawn in the year 1797 by a very eminent pleader for the purpose of suppressing an ancient custom of kicking about foot-balls on a Shrove Tuesday, at Kingston-upon-Thames. The first count is for riotously kicking about a foot-ball in the town of Kingston; and the second, for a common nuisance in kicking about a foot-ball in the said town. And in Sir Anthony Ashley's case, 1 Roll. R. 109. Coke, C. J. said, that the *stage players* might be indicted for a riot and unlawful assembly: and see Dalt. Just. c. 136. (citing Roll. R.) that if such players by their shews occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. *Riots, &c.* (A) 8.

to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot, if the number of persons are not more than are necessary for the purpose, and if there are no threatening words used, nor any other disturbance of the peace; even though another man has better right to the thing carried away, and the act therefore is wrong and unlawful. (*h*) Much more may any person, in a peaceable manner, assemble a fit number of persons to do any lawful thing; as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus where, a man having erected a wear across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the wear in order to turn the water and the better to remove it, and thus removed the nuisance, it was holden not to be a forcible entry nor a riot. (*i*)

The legality or illegality of the act intended to be done not material if there be violence and tumult.

But if there be violence and tumult, it has been generally holden not to make any difference whether the act intended to be done by the persons assembled be of itself lawful or unlawful; from whence it follows that if three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. (*k*) And if in removing a nuisance the per-

(*h*) 1 Hawk. P. C. c. 65. s. 5. Reg. *v.* Soley, 11 Mod. 117. Dalt. c. 137. 5 Burn. Just. *Riot*, s. 1.

(*i*) Dalt. c. 137. 5 Burn. *Riot*, s. 1.

(*k*) 1 Hawk. P. C. c. 65. s. 7. The law will not suffer persons to seek redress of their private grievances by such dangerous disturbances of the public peace; but the justice of the quarrel in which such an assembly may have been engaged will be considered as a great mitigation

sons assembled use any threatening words, (such as, they will do it though they die for it, or the like) or in any other way behave in apparent disturbance of the peace, it seems to be a riot. (*l*)

How far the violence and tumult must be premeditated.

But the violence and tumult must in some degree be premeditated. For if a number of persons, being met together at a fair, market, or any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems to be agreed that they are not guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention. (*m*) But if there be any predetermined purpose of acting with violence and tumult, the conduct of the parties may be deemed riotous. As where it was held that although the audience in a public theatre have a right to express the feelings excited at the moment by the performance, and in this manner to applaud or to hiss any piece which is represented, or any performer who exhibits himself on the stage; yet if a number of persons, having come to the theatre with a predetermined purpose of interrupting the performance, for this purpose make a great noise and disturbance, so as to render the actors entirely inaudible, though without offering personal violence to any individual, or doing any injury to the house, they are guilty of a riot. (*n*)

of the offence. And *Per Cur.* in 12 Mod. 618. Anon. If one goes to assert his right *with force and violence*, he may be guilty of a riot.

(*l*) Dalt. c. 137. 5 Burn. Just. *Riot*, s. 1. where it is said, that if there is cause to remove any such nuisance, or to do any like act, it is safest not to assemble any multitude of people, but only to send one or two persons, or if a greater number, yet no more than are needful, and only with meet tools, in order to remove it; and that such persons tend their business only, without disturbance of the peace, or threatening speeches.

(*m*) 1 Hawk. P. C. c. 65. s. 3.

(*n*) Clifford *v.* Brandon, 2 Campb. 358.

Even though the parties may have assembled for an innocent purpose in the first instance, yet if they afterwards, upon a dispute happening to arise amongst them, form themselves into parties, with promises of mutual assistance, and then make an affray, it is said that they are guilty of a riot, because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming had been on such a design: and it seems to be clear that if, in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house, or inclosure, or to do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together, for such a new purpose, is in no way extenuated by their having met at first upon another. (*o*)

Though the parties assembled in the first instance for an innocent purpose, they may afterwards be guilty of a riot.

If any person, seeing others actually engaged in a riot, joins himself to them and assists them therein, he is as much a rioter as if he had at first assembled with them for the same purpose, inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself to them with an intention of seconding them in the execution of their unlawful enterprize: and it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design. (*p*) And the law is that if any person encourages, or promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals. (*q*) It has been ruled, however, that

Any person taking part in a riot is a rioter; all are principals

(*o*) 1 Hawk. P. C. c. 65. s. 3.
(*p*) *Id. ibid.*
(*q*) By Mansfield, C. J. in Clifford *v.* Brandon, 2 Campb. 370.

if three or more, being lawfully assembled, quarrel, and the party fall on one of their own company, this is no riot; but that if it be on a stranger, the very moment the quarrel begins, they begin to be an unlawful assembly, and their concurrence is evidence of an evil intention in them that concur, so that it is a riot in them that act, and in no more. (*r*) The *inciting* persons to assemble in a riotous manner, appears also to have been considered as an indictable offence. (*s*)

Statutes.

Concerning some acts done in a tumultuous and riotous manner, especial provision is made by particular statutes.

1 G. I. st. 2. c. 5. s. 4. Rioters pulling down, &c. churches, houses, &c. guilty of felony without clergy.

By the 1 Geo. I. st. 2. c. 5. s. 4. "if any persons unlawfully, riotously, and tumultuously, assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any church or chapel, or any building for religious worship, certified and registered (according to the 1 W. & M. sess. 1. c. 18.) or any dwelling-house, barn, stable, or other outhouse, that then every such demolishing, or pulling down, or beginning to demolish, or pull down, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death, as in case of felony, without benefit of clergy." (*t*) Principals in the second

And see Rex v. Royce, 4 Burr. 2073. and the second and third resolutions in the Sissinghurst house case, 1 Hale, 463.

(*r*) 19 Vin. Ab. *Riots, &c.* (A) 15. Reg. v. Ellis, 2 Salk. 595.

(*s*) See a precedent, Cro. Circ. Comp. 420. (8th ed.) the 1st count of which is for *inciting* persons to assemble, and that in consequence of such incitement they did so; and the second count states the inciting, and omits the assembling in consequence of it. See a similar precedent in 2 Chit. Crim. L. 506. and the principles stated, *ante*, p. 61. *et sequ.*

(*t*) The sixth section of this statute makes provision for recovery of damages done to any church, &c. by action against the inhabitants of the hundred, or in some cases against the inhabitants of a city; and section 11. provides for the recovery of such damages in *Scotland*. Most of the cases upon

degree are within this statute: and where a jury found by a special verdict that the defendant was present at a riot, and encouraged and abetted the rioters in beginning to demolish and pull down a dwelling house, by shouting and using expressions to incite them, it was held that he was a principal in the second degree, and as such ousted of his clergy, though he did no act himself. (*u*) By the eighth section of this statute no person is to be prosecuted, by virtue of the act, for any offence committed contrary to it, unless the prosecution be commenced within twelve months after the offence committed.

this subject are collected in the notes to 2 Saund. 377, a. *et sequ.* But two cases of recent occurrence may be mentioned here. In one of them (Sampson *v.* Chambers and another, 4 Campb. 221.) it was held that, in an action on this statute, the breaking of inside window shutters, a window sill, and the wood of the fanlight, is sufficient evidence of a beginning to pull down, if the mob are interrupted and dispersed, while committing these acts of violence, by an alarm of the approach of the military. In the other (Lord King *v.* Chambers and another, 4 Campb. 377.) it was held that in order to render the hundred liable for partial damage done to a house, the rioters must have begun to demolish it *with the intention of actually demolishing it*, if not interrupted. But by a recent statute 57 Geo. III. c. 19. s. 38. it is enacted "that in every case "where any house, shop, or other "building whatever, or any part "thereof, shall be destroyed, or "shall be in any manner damaged, "or injured, or where any fixtures "thereto attached, or any furni-"ture, goods, or commodities, "whatever which shall be therein, "shall be destroyed, taken away, "or damaged by the act or acts of "any riotous or tumultuous as-"sembly of persons, or by the act "or acts of any person or persons "engaged in, or making part of, "such riotous or tumultuous as-"sembly," the inhabitants of the city, &c. in which such house, &c. shall be situate, if such city, &c. be a county of itself, or is not within any hundred, or otherwise the inhabitants of the hundred, in which such damage shall be done, shall yield compensation to the person damnified; to be recovered by the same means, and under the same provisions as are provided by 1 Geo. I. c. 5. with respect to persons injured and damnified by the demolishing or pulling down of any dwelling-house, by persons unlawfully, riotously, and tumultuously assembled.

(*u*) Rex *v.* Royce, 4 Burr. 2073. And see *ante*, 33, *et sequ.*

9 G. III. c. 29. s. 1. Rioters pulling down, &c. mills, guilty of felony without clergy.

The 9 Geo. III. c. 29. s. 1. reciting the fourth section of the 1 Geo. I. st. 2. c. 5. and that doubts had arisen whether it extended to the pulling down and demolishing of mills, enacts, "That if any person or persons unlawfully, riotously, and tumultuously, assembled together, to the disturbance of the public peace, shall unlawfully and with force demolish or pull down, or begin to demolish or pull down, any wind-saw mill, or other wind mill, or any water-mill, or other mill, which shall have been or shall be erected, or any of the works thereto respectively belonging; that then every such demolishing or pulling down, or beginning to demolish or pull down, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy." The fourth section provides, that no person shall be prosecuted by virtue of the act for any offence committed contrary to it, unless such prosecution be commenced within eighteen months after the offence committed.

33 G. III. c. 67. s. 1. Seamen, &c. riotously assembled who shall forcibly prevent the loading, &c. of any vessels, &c. to be committed to prison.

The 33 Geo. III. c. 67. s. 1. reciting that seamen, keelmen, &c. had of late assembled themselves in great numbers, and had committed many acts of violence; and that such practices, if continued, might occasion great loss and damage to individuals, and injure the trade and navigation of the kingdom, enacts, "That if any seamen, keelmen, casters, ship carpenters, or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating, of any ship, keel, or other vessel, or shall unlawfully and with force board any ship, keel, or other vessel, with intent to prevent, hinder, or obstruct, the loading or unloading, or the sailing or navigating of such ship, keel, or other vessel, every seaman, keelman, caster, ship carpenter, and other person," (being lawfully convicted of any of the offences aforesaid upon any indictment found in any court of oyer and terminer, or general or quarter sessions of the

peace for the county, division, district, &c. wherein the offence was committed); shall be committed either to the common gaol or to the house of correction for the same county, &c. there to continue and to be kept to hard labour for any term not exceeding twelve calendar months, nor less than six calendar months. The fourth section provides, that the act shall not extend to any act, deed, &c. done in the service or by the authority of his Majesty. The seventh section enacts, that offences committed on the high seas shall be triable in any session of oyer and terminer, &c. for the trial of offences committed on the high seas within the jurisdiction of the Admiralty. And by the eighth section it is provided, that no person shall be prosecuted by virtue of the act for any of the offences therein mentioned, unless such prosecution be commenced within twelve calendar months after the offence committed. (*w*)

52 Geo. III. c. 130. Rioters pulling down, &c. buildings, engines, &c. used in trades or manufactories, guilty of felony without clergy.

The 52 Geo. III. c. 130. reciting the 1 Geo. I. st. 2. c. 5. and the 9 Geo. III. c. 29. and several other acts, and stating that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of the said acts, makes the burning certain buildings, &c. used for manufactories a capital offence, and then enacts, "That if any person or persons unlawfully, riotously, and tumultuously, assembled together in "disturbance of the public peace, shall unlawfully and with "force demolish or pull down, or begin to demolish or pull "down, any erection and building, or engine, which shall be "used or employed in the carrying on or conducting of any "trade or manufactory, or any branch or department of any "trade or manufactory of goods, wares, or merchandize, of "any kind or description whatsoever, or in which any goods, "wares, or merchandize, shall be warehoused or deposited; "that then every such demolishing or pulling down, or be-"ginning to demolish or pull down, shall be adjudged

(*w*) This statute was at first only temporary, but was made perpetual by 11 Geo. III. c. 19.

" felony, without benefit of clergy, and the offenders therein " shall be adjudged felons, and shall suffer death, as in cases " of felony, without benefit of clergy." (*x*)

56 Geo. III. c. 125. s. 1. Rioters pulling down, &c. engines, bridges, buildings, &c. belonging to collieries, mines, &c. guilty of felony without clergy.

The 56 Geo. III. c. 125. reciting the 1 Geo. I. st. 1. c. 5. the 9 Geo. III. c. 29. and the 52 Geo. III. c. 130. and that it was expedient and necessary that more effectual provisions should be made for the protection of property not within the provisions of those acts, enacts, " That if any " person or persons unlawfully, riotously, and tumultuously " assembled together in disturbance of the public peace, " shall unlawfully and with force demolish, pull down, de- " stroy or damage, or begin to demolish, pull down, destroy " or damage, any fire engine, or other engine, erected, or to " be erected, for making, sinking, or working collieries, coal " mines, or other mines, or any bridge, waggon way, or " trunk, erected or made, or to be erected or made, for con- " veying coals or other minerals from any colliery, coal mine " or other mine, to any place, or for shipping the same, or " any staith or other erection or building for depositing " coals or other minerals, or used in the management or " conducting of the business of any such colliery, coal mine, " or other mine, whether the same engines, bridges, waggon- " ways, trunks, staiths, erections and other buildings or " works, shall be respectively completed and finished, or " only begun to be set up, made and erected, that then " every such demolishing, pulling down, destroying and " damaging, or beginning to demolish, pull down, destroy

(*x*) The third section enacts, that persons injured by such demolishing, &c. may recover the value or damage in the same manner as is provided by the 1 Geo. I. st. 2. c. 5. in respect of the buildings mentioned in that act. The fourth section provides as to some of the proceedings necessary to entitle a person to recovery; a notice within two days after the damage, an examination on oath, within four days after the notice, as to the persons who committed the fact being known, and a recognizance to prosecute if the offenders are known. And there is a proviso also, that the action against the hundred shall be brought within a year after the offence committed.

"and damage, shall be adjudged felony, without benefit of "clergy; and the offenders therein shall be adjudged felons, "and shall suffer death as in case of felony without benefit "of clergy." (*y*)

Women are punishable as rioters, but infants under the age of discretion are not. (*z*)

II. By some books the notion of a *rout* is confined to such assemblies only as are occasioned by some grievance common to all the company; as the inclosure of land in which they all claim a right of common, &c. But, according to the general opinion, it seems to be a disturbance of the peace by persons assembling together with an intention to do a thing, which, if it be executed, will make them rioters, and actually making a motion towards the execution of their purpose. In fact it generally agrees, in all the particulars, with a riot, except only in this, that it may be a complete offence without the execution of the intended enterprize. (*a*) And it seems, by the recitals in several statutes, that if people assemble themselves, and afterwards proceed, ride, go forth, or move by instigation of one or several conducting them, this is a *rout*; inasmuch as they move and proceed in rout and number. (*b*) Of a rout.

III. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely as- Of an unlawful assembly.

(*y*) The second and third sections provide as to the recovery of the value of property destroyed, and as to the proceedings for such purpose, in a manner nearly similar to the third and fourth sections of the 52 Geo. III. c. 130. See *ante*, note (*x*).

(*z*) 1 Hawk. P. C. c. 65. s. 14. *Ante*, 2. *et sequ.* and 25. But an infant above the age of discretion is punishable; and though under the age of eighteen, need not appear by guardian, but may appear by attorney. Regin. *v.* Tanner, 2 Lord Raym. 1284.

(*a*) 1 Hawk P. C. c. 65. s. 8.

(*b*) 19 Vin. Abr. *Riots, &c.* (A) 2. referring to 18 Edw. III. c. 1. 13 Hen. IV. c. ult. and 2 Hen. V. c. 8.

sembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion towards its execution. Mr. Serjeant Hawkins, however, thinks this much too narrow an opinion; and that any meeting of great numbers of people with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an *unlawful assembly*. As where great numbers complaining of a common grievance meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly. (*c*)

An assembly of a man's friends for the defence of his person against those who threaten to beat him, if he go to such a market, &c. is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders to the disturbance of the public peace. But an assembly of a man's friends in his own house, for the defence of the possession of it against such as threaten to make an unlawful entry, or for the defence of his person against such as threaten to beat him in his house, is indulged by law; for a man's house is looked upon as his castle. (*d*) He is not, however,

(*c*) 1 Hawk. P. C. c. 65. s. 9. There may be an unlawful assembly if the people assemble themselves together for an ill purpose contra pacem, though they do nothing, Br. Riots, pl 4. Lord Coke speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout, and do not do it. 3 Inst. 176.

(*d*) 1 Hawk. P. C. c. 65. s. 9, 10. 19 Vin. Abr. *Riots, &c.* (A) 5, 6. And, by Holt, C. J. in Regin. *v.* Soley, 11 Mod. 116. though a man may ride with arms, yet he cannot take two with him to defend himself, even though his life is threatened; for he is in the protection of the law, which is sufficient for his defence.

to arm himself and assemble his friends in defence of his close. (*e*)

Statutes.

Unlawful assemblies and seditious meetings having in many instances appeared to threaten the public tranquillity and the security of the government, several statutes have been passed for the purpose of their more immediate and effectual suppression.

1 Geo. I. st. 2. c. 5. s. 1. Twelve persons or more unlawfully assembled and not dispersing after being commanded by one justice, &c. by proclamation; to be adjudged felons, and suffer death without benefit of clergy.

The 1 Geo. I. st. 2. c. 5. s. 1. reciting, that many rebellious riots and tumults had been in divers parts of the kingdom, to the disturbance of the public peace, and the endangering of his majesty's person and government, and that the punishments provided by the laws then in being were not adequate to such heinous offences; for the preventing and suppressing such riots and tumults, and for the more speedy and effectual punishing the offenders, enacts, "That if any "persons to the number of *twelve* or more, being unlaw- "fully, riotously, and tumultuously assembled together, to "the disturbance of the public peace, and being required or "commanded by any one or more justice or justices of the "peace, or by the sheriff of the county, or his under-sheriff, "or by the mayor, bailiff or bailiffs, or other head officer, or "justice of the peace of any city or town corporate, where "such assembly shall be, by proclamation to be made in the "king's name, in the form hereinafter directed, to disperse "themselves, and peaceably to depart to their habitations, "or to their lawful business, shall, to the number of twelve "or more (notwithstanding such proclamation made) unlaw- "fully, riotously, and tumultuously remain, or continue "together by the space of one hour after such command or "request made by proclamation, that then such continuing "together to the number of twelve or more, after such com- "mand or request made by proclamation, shall be adjudged "felony without benefit of clergy, and the offenders therein

(*e*) By Heath, J. Rex v. the Bishop of Bangor, *Shrewsbury* Sum. Ass. 1796.

" shall be adjudged felons, and shall suffer death as in case " of felony without benefit of clergy."

1 Geo. I. st. 2. c. 5. s. 2. provides as to the form of the proclamation, and manner in which it shall be made.

The second section of the statute gives the form of the proclamation, and enacts, that the justice of the peace or other person authorized by the act to make the proclamation shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be while proclamation is making, and after that shall openly and with loud voice make, or cause to be made, proclamation in these words, or like in effect: " Our sovereign lord the king chargeth and commandeth " all persons, being assembled, immediately to disperse " themselves, and peaceably to depart to their habitations, " or to their lawful business, upon the pains contained in " the act made in the first year of king George, for prevent- " ing tumults and riotous assemblies. God save the king." And every justice, sheriff, &c. within the limits of their respective jurisdictions are authorized and required, on notice or knowledge of any such unlawful assembly of twelve or more persons, to resort to the place, and there to make or cause such proclamation to be made.

1 Geo. I. st. 2. c. 5. s. 3. Persons so assembled, and not dispersing within an hour, to be seized and taken before a justice.

The third section enacts, that if the persons so unlawfully, riotously, and tumultuously assembled, or twelve or more of them, after such proclamation, shall continue together and not disperse themselves within one hour, that it shall be lawful for every justice, sheriff, or under-sheriff of the county where such assembly shall be, and for every constable or other peace officer within such county, and for every mayor, justice, sheriff, bailiff and other head officer, constable and other peace officer of any city or town where such assembly shall be, and for such other persons as shall be commanded to be assisting unto any such justice, sheriff or under-sheriff, mayor, bailiff, or other head officer (who are thereby authorized to command all his majesty's subjects of age and ability to be assisting to them therein) to seize

and apprehend such persons so unlawfully, riotously, and tumultuously continuing together after proclamation made; and they are thereby required so to do. And that they shall carry the persons so apprehended before one or more of his Majesty's justices of the peace, of the county or place where such persons shall be so apprehended, in order to their being proceeded against according to law. And the section also enacts that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending them, or in the endeavour to do so, by reason of their resisting, then every such justice, &c. constable, or other peace officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting.

And if they make resistance, the persons killing them, &c. are indemnified.

The fifth section provides, "That if any person or persons do, or shall, with force and arms, wilfully and knowingly oppose, obstruct, or in any manner wilfully and knowingly lett, hinder, or hurt, any person or persons that shall begin to proclaim, or go to proclaim, according to the proclamation hereby directed to be made, whereby such proclamation shall not be made, that then every such opposing, obstructing, letting, hindering, or hurting, such person or persons, so beginning or going to make such proclamation, as aforesaid, shall be adjudged felony without benefit of clergy; and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony, without benefit of clergy; and that also every such person or persons so being unlawfully, riotously, and tumultuously assembled, to the number of twelve, as aforesaid, or more, to whom proclamation should or ought to have been made, if the same had not been hindered, as aforesaid, shall likewise, in case they or any of them, to the number of twelve or more, shall continue together, and not disperse themselves within one hour after such lett or hindrance so made, be adjudged felons,

1 G. I. st. 2. c. 5. s. 5. Preventing such proclamation from being made, felony without clergy.

And persons so assembled where the proclamation is hindered, and not dispersing within an hour, felons without clergy.

" and shall suffer death as in case of felony, without benefit " of clergy."

Prosecutions to be commenced in 12 months.

By the eighth section of the act, it is provided that no person shall be prosecuted by virtue of the act for any offence committed contrary to it, unless the prosecution be commenced within twelve months after the offence committed. (*f*)

39 G. III. c. 79. s. 1. Certain societies are suppressed.

By the 39 Geo. III. c. 79. s. 1. reciting that divers societies had been instituted in this kingdom and in *Ireland*, of a new and dangerous nature, inconsistent with public tranquillity, and with the existence of regular government; particularly certain societies calling themselves " *Societies* " *of United Englishmen, United Scotsmen, United Britons,* " *United Irishmen, and The London Corresponding Society,*" and that it was expedient and necessary that all such societies, and all societies of the like nature, should be utterly suppressed and prohibited, as unlawful combinations and confederacies, highly dangerous to the peace and tranquillity of these kingdoms, and to the constitution of the government thereof, as by law established, it is enacted, " That " all the said societies of *United Englishmen, United Scots-* " *men, United Irishmen,* and *United Britons,* and the said " society commonly called the *London Corresponding So-* " *ciety,* and all other societies called *Corresponding Socie-* " *ties,* of any other city, town, or place, shall be, and the " same are hereby utterly suppressed and prohibited, as " being unlawful combinations and confederacies against

(*f*) For the section of the act relating to the demolishing or pulling down churches, chapels, houses, &c. by rioters, see *ante*, 356, 357. The ninth section of the act enacts, that sheriffs, &c. in *Scotland*, shall have the same power for putting the act in execution as justices, &c. have here: and that offenders in *Scotland* shall suffer death, and confiscation of moveables. This statute is commonly called the *Riot Act*, and is required by s. 7. to be openly read at every quarter session, and at every leet or law day.

"the government of our sovereign lord the King, and "against the peace and security of his Majesty's liege sub-"jects."

The second section of the statute enacts, that the said societies, and every other society then established, or hereafter to be established, the members whereof shall, according to the rules thereof, or to any provision or agreement for that purpose, be required or admitted to take any oath or engagement which shall be an unlawful oath or engagement, within the intent or meaning of the 37 Geo. III. c. 123. (g) or to take any oath not required or authorized by law; and every society the members whereof, or any of them, shall take, or in any manner bind themselves by any such oath or engagement, on becoming, or in consequence of being members of such society; and every society the members whereof shall take, subscribe, or assent to any test or declaration not required by law, or not authorised in manner hereinafter mentioned; and every society of which the names of the members, or of any of them, shall be kept secret from the society at large, or which shall have any committee, or select body, so chosen or appointed that the members, constituting the same, shall not be known, by the society at large, to be members of such committee, or select body; or which shall have any president, &c. or other officer, so chosen and appointed, that the election or appointment shall not be known to the society at large, or of which the names of all the members, and of all committees or select bodies of members, and of all presidents, &c. shall not be entered in a book to be kept for that purpose, and open to the inspection of all the members; and every society which shall be composed of different divisions or branches, or of different parts, acting in any manner separately or distinct from each other, or of which any part shall have any separate or distinct president, &c. or other officer, elected or appointed by, or for such part, or to act

39 G. III. c. 79. s. 2. Societies, the members of which shall take unlawful oaths or engagements, &c. or where the names of some of the members or of persons forming committees, &c. shall be kept secret, or where there are divisions, or branch societies, are to be deemed unlawful combinations and confederacies.

(g) *Ante*, p. 200, *et sequ.*

as an officer for such part; shall be deemed and taken to be *unlawful combinations and confederacies.* (*h*) And further, that every person who shall directly or indirectly maintain correspondence or intercourse with any such society, or with any division, branch, committee, or other select body, president, &c. or other officer, or member thereof as such, or who shall by contribution of money, or otherwise, aid, abet, or support, such society, or any members or officers thereof, as such, shall be deemed guilty of an unlawful combination and confederacy.

And persons corresponding with such societies, or aiding them, to be deemed guilty of an unlawful combination and confederacy.

The act is not to extend to declarations approved by two justices, and registered: nor to lodges of Free-masons, where there is a certificate and registry.

There is a provision, that the act shall not extend to declarations approved by two justices, and registered with the clerk of the peace; but that such approbation shall only remain valid till the next general session, unless the same shall be confirmed by the major part of the justices at such general session. (*i*) And it is also enacted, that it shall not extend to the meetings of societies, or lodges of Free-masons, which, before the passing of the act, had been usually held, under the denomination of "Lodges of Free-"masons," and in conformity to the rules prevailing among such societies; (*k*) provided that there be a certificate of two of the members upon oath, that such society or lodge had been usually held under such denomination, and in conformity to such rules; the certificate duly attested, &c. being, within two months after the passing of the act, deposited with the clerk of the peace, with whom also the name or denomination of the society or lodge, and the usual place and time of meeting, and the names and descriptions of the members, are to be registered yearly. (*l*) The clerk of the peace is required to enrol such certificate and registry, and to lay the same, once in every year, before the general session of the justices; and the justices

But the justices may or-

(*h*) By the 59 Geo. III. c. 19. s. 27. this enactment is not to extend to meetings of *Quakers*, or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter shall be discussed.

(*i*) 39 Geo. III. c. 79. s. 3.

(*k*) *Id.* s. 5.

(*l*) *Id.* s. 6.

may upon complaint, upon oath, that the continuance of the meetings of any such lodge or society is likely to be injurious to the public peace and good order, direct them to be discontinued: and any such meeting, held notwithstanding such order or discontinuance, and before the same shall, by the like authority, be revoked, shall be deemed *an unlawful combination and confederacy* under the provisions of the act. (*m*)

der the meetings of any lodge to be discontinued: and any meeting held notwithstanding such order, will be an unlawful combination and confederacy.

The eighth section of the statute enacts "That every "person who, at any time after the passing of this act, shall, "in breach of the provisions thereof, be guilty of any such "unlawful combination and confederacy as in this act is "described, shall and may be proceeded against for such "offence in a summary way, either before one or more jus- "tice or justices of the peace for the county, stewartry, "riding, division, city, town, or place, where such person "shall happen to be, or by indictment to be preferred in "the county, riding, division, city, town, or place, in *Eng-* "*land*, wherein such offence shall be committed, or by in- "dictment in the court of justiciary, or in any of the cir- "cuit courts in *Scotland*, if the offence shall be committed "in Scotland; and every person being convicted of any "such offence, on the oath of one or more credible wit- "ness or witnesses, by such justice or justices as aforesaid, "shall be by him, or them, committed to the common gaol, "or house of correction, for such county, &c. there to re- "main without bail or main-prize, for the term of three "calendar months; or shall be by such justice or justices "adjudged to forfeit and pay the sum of twenty pounds, as "to such justice or justices shall seem meet; and in case "such sum of money shall not be forthwith paid into the "hands of such justice or justices, he or they shall by war- "rant under his or their hand and seal, or hands and seals, "cause the same to be levied by distress and sale of the "offender's goods and chattels, together with all costs and

39 G. III. c. 79. s. 8. Proceedings against offenders before justices, or by indictment.

(*m*) 39 Geo. III. c. 79. s. 7.

"charges attending such distress and sale; and, for want "of sufficient distress, shall commit such offender to the "common gaol or house of correction of such county, &c. "for any time not exceeding three calendar months; and "every person convicted of any such offence, upon indict- "ment by due course of law, shall and may be transported "for the term of seven years, in the manner provided by "law for transportation of offenders; or imprisoned for "any time not exceeding two years, as the court before "whom such offender shall be tried shall think fit; and "every such offender, who shall be ordered to be trans- "ported, shall be subject and liable to all laws concerning "offenders ordered to be transported."

Justices may mitigate the punishment.

But the justice or justices, before whom any person shall be convicted of any unlawful combination or confederacy, may mitigate the punishment, so as it be not thereby reduced to less than one third of the punishment by the act directed to be inflicted, whether by imprisonment or fine. (*n*)

And persons either prosecuted before a justice or indicted, are not liable to other prosecutions.

And it is provided, that any person who shall be convicted or acquitted by any justice, upon a summary prosecution, shall not afterwards be prosecuted by indictment, or otherwise, for the same offence; and in like manner that any person convicted, or acquitted, upon an indictment, shall not afterwards be prosecuted before any justice in a summary way. (*o*)

But offenders may be indicted if not prosecuted under this act.

But the act is not to extend to prevent any prosecution by indictment or otherwise, for any thing which shall be an offence within the intent and meaning of the act, and which might have been so prosecuted if the act had not been made, unless the offender shall have been prosecuted for such offence under the act, and convicted or acquitted of such offence. (*p*)

57 G. III. c. 19. Temporary enactments.

A recent statute, 57 Geo. III. c. 19. contains many enactments relating to assemblies of persons, collected for

(*n*) 39 Geo. III. c. 79. s. 9.
(*o*) *Id.* s. 10.
(*p*) *Id.* s. 11.

the purpose, or under the pretext, of deliberating on public grievances, and of agreeing on petitions and addresses to the throne, or to the houses of parliament; but as they are declared to be only temporary, (*q*) and may not be continued, it may be sufficient to abstract them as shortly as possible.

No meeting of more than fifty persons (except county meetings, &c.) is to be holden without notice. And meetings without such notice are to be deemed unlawful assemblies. And an adjourned meeting is to be deemed an unlawful assembly.

It enacts, that no meeting of persons exceeding the number of fifty, (except any meeting of any county, &c. called by the lord lieutenant, custos rotulorum, or sheriff, or by two or more justices, or by the major part of the grand jury at the assizes, or general quarter sessions, or any meeting of any city, &c. called by the mayor, or other head officer of such city, &c. or any meeting of any ward or division of any city, called by the alderman, or other head officer, of such ward or division, or any meeting of any corporate body) shall be holden for the purpose of considering of any petition, or other address, for alteration of matters established in church or state, or for the purpose of deliberating upon any grievance in church or state, unless notice of such meeting shall be given in the names of seven householders at least, with their places of abode and descriptions, by public advertisement in a newspaper, five days at least before the meeting, (an authority to insert such notice in the newspaper being signed by seven householders, and written at the foot of a copy of the notice in the manner particularly specified in the act), or shall be delivered, signed by the seven persons in whose names it shall be given, with their places of abode and description, five days at the least before the meeting, to the clerk of the peace of the county, &c.; who is directed to send a copy of such notice to three justices of the peace, at the least, of such county, &c.; or in case the justices of the city, &c. where

(*q*) By s. 22. the clauses and provisions of the act therein before contained, are to continue in force until the 24th of July 1818. They are, with little variation, the same as were contained in a former act 36 Geo. III. c. 8. the continuance of which was for three years from the 18th December, 1795

such meeting is proposed to be holden, have exclusive jurisdiction, then to three of such justices, if there are so many resident within the jurisdiction, and if not, to so many as shall be resident. (*r*) And all meetings of persons exceeding the number of fifty, held, without such previous notice, for such purposes, are to be deemed *unlawful assemblies*. (*s*) Adjournments of meetings held by virtue of such previous notice, are prohibited; and any meeting exceeding the number of fifty persons, held by way of an adjourned meeting, is to be deemed an *unlawful assembly*. (*t*)

57 Geo. III. c. 19. s. 5, 6. Persons assembled contrary to the act, and not dispersing after being required so to do by proclamation, guilty of felony without clergy.

The punishment of persons assembled contrary to the act, and not dispersing after being required so to do by proclamation, is very serious. If any such persons to the number of twelve or more, notwithstanding the proclamation made, continue together by the space of one hour afterwards, they will be guilty of felony without benefit of clergy. (*u*) The form of the proclamation, and the manner in which it is to be made, are nearly similar to the proceedings under the 1 Geo. I. st. 2. c. 5. (*w*)

57 Geo. III. c. 19. s. 7. Meetings, where notices express certain particulars, to be dispersed by proclamation. And persons to the

Where the matter which shall be in the notice proposed to be propounded or deliberated upon at any such meeting shall purport that any thing by law established may be altered otherwise than by the authority of the king, lords, and commons, in parliament assembled, or such notice shall tend to incite the people to hatred or contempt of the person of his majesty, or of the government and constitution, it

(*r*) 57 Geo. III. c. 19. s. 1, 2. By s. 12. the act is not to legalize any notice which would have been contrary to law, if the act had not been made.

(*s*) *Id.* s. 3.

(*t*) *Id.* s. 4.

(*u*) *Id.* s. 5.

(*w*) *Ante*, 363, 4. The proclamation does not refer to the act of 1 Geo. I. and is in the following form: "Our sovereign lord the "king chargeth and commandeth "all persons here assembled im- "mediately to disperse themselves, "and peaceably to depart to their "habitations, or to their lawful "business, upon pain of death. "God save the king." *Id.* s. 6.

shall be lawful for one or more justices of the peace, or the sheriff, or his under-sheriff, or the mayor or other head officer, or any justice or magistrate of any city, &c. by proclamation, as before set forth, (*x*) to command the persons to disperse: and if any persons to the number of twelve or more being so commanded, shall, to the number of twelve or more, notwithstanding such proclamation, remain or continue together, by the space of one hour after the proclamation, such continuing together, to the number of twelve or more, shall be adjudged felony without benefit of clergy. (*y*)

number of 12 or more continuing together one hour after proclamation, guilty of felony without clergy.

The eighth and three following sections relate to the powers of justices, &c. to carry the act into execution, and the punishment of those who obstruct them in the performance of their duties. If any justice, &c. at any such meeting shall order any person maintaining any of the illegal propositions before mentioned to be taken into custody to be dealt with according to law, then, in case the said justice, &c. or any peace officer acting under their orders, shall be obstructed in taking into custody any person so ordered to be taken into custody, it shall be lawful for any such justice, &c. thereupon to make the proclamation mentioned in the former section; and if any persons to the number of twelve or more shall, notwithstanding the proclamation, continue together by the space of one hour after the proclamation, such continuing together shall be adjudged felony without benefit of clergy. (*z*) Every justice, &c. is authorized, on knowledge of any such meeting, to resort to the place, and to act as the case may require, within the powers given them by law; and may take and require the assistance of any number of constables or other officers of the peace within their respective districts, or within the district or place wherein every such meeting shall be holden. (*a*) It is also provided, that persons so assembled and not dispers-

57 Geo. III. c. 19. s. 8, 9, 10, 11. Powers of justices, &c. to carry the act into execution; and punishment of persons obstructing them.

(*x*) *Ante*, note (*w*).
(*y*) 57 Geo. III. c. 19. s. 7.
(*z*) *Id.* s. 8.
(*a*) *Id.* s. 9.

ing themselves within one hour after proclamation, may be seized and carried before a justice of the county or place where they shall be so apprehended, in order to their being proceeded against according to law: and that if any of the persons so assembled shall happen to be killed, maimed, or hurt, in the dispersing, seizing, or apprehending them, or in the endeavour so to do, by reason of their resisting, then every justice, &c. constable or other peace officer, and all persons being aiding and assisting to them, shall be free, discharged, and indemnified concerning such killing, maiming, or hurting. (*b*) If any persons shall oppose or hinder any justice or other person authorized by the statute who shall attend, or be going to attend, any such meeting, or who shall begin to proclaim, or go to proclaim, according to the proclamation directed by the act, whereby such proclamation shall not be made, such opposing, &c. shall be adjudged felony without benefit of clergy; and every such person or persons so assembled to the number of fifty or more, to whom such proclamation ought to have been made, if it had not been hindered, shall likewise, in case they or any of them, to the number of twelve or more, shall not disperse themselves within one hour after such hindrance, having knowledge of such hindrance, be adjudged felons, and suffer death without benefit of clergy. And if any person shall, with force and arms, wilfully and knowingly oppose, &c. hinder or hurt, any justice, &c. in apprehending any person, or endeavouring so to do, every such opposing, &c. hindering, or hurting, shall be adjudged felony without benefit of clergy. (*c*)

(*b*) 57 Geo. III. c. 19. s. 10. The section is similar to the third section of 1 Geo. I. st. 2. c. 5. *ante*, 364.

(*c*) *Id.* s. 11. The twelfth section enacts, that the sheriff's depute, &c. in *Scotland* shall have the same powers for putting the act in execution as the justices of the peace, &c. in other parts of the kingdom; and that persons convicted of felonies in *Scotland* shall incur the pains of death and confiscation of moveables. By s. 21. prosecutions must be commenced within six months after the offences committed.

This statute, 57 Geo. III. c. 19. contains also several enactments relating to meetings and assemblies of persons which are not of a limited duration like those which have been already mentioned.

57 Geo. III. c. 19. Enactments not limited in their duration.

The twenty-third section, reciting, that it is highly inexpedient that public meetings or assemblies should be held near the houses of parliament, or near the courts of justice in *Westminster Hall*, on certain days; enacts, that it shall not be lawful for any person to convene, or to give any notice for convening, any meeting consisting of more than fifty persons, or for any number of persons exceeding fifty to meet in any street, square, or open place, in the city or liberties of *Westminster*, or county of *Middlesex*, within the distance of a mile from the gate of *Westminster Hall*, (except such parts of the parish of *St. Paul's*, *Covent Garden*, as are within such distance) for the purpose of considering of or preparing any petition, &c. for alteration of matters in church or state, on any day on which the two houses, or either house of parliament, shall meet and sit, nor on any day on which the courts shall sit in *Westminster Hall*. And that if any meeting or assembly for such purposes shall be assembled or holden on such day, it shall be deemed an *unlawful assembly*. But there is a provision that the enactment shall not apply to any meeting for the election of members of parliament, or to persons attending upon the business of either house of parliament, or any of the said courts.

S. 23. No meetings to be held on certain days within a mile of *Westminster Hall*.

The twenty-fourth section recites, that divers societies and clubs had been instituted in the metropolis, and in various parts of the kingdom, of a dangerous nature and tendency, inconsistent with the public tranquillity and the existence of the established government, laws, and constitution, of the kingdom; and that the members of many such societies or clubs had taken unlawful oaths and engagements of fidelity and secrecy, and had taken or subscribed or assented to illegal tests and declarations; and that many of these

57 Geo. III. c. 19. s. 24. Recites concerning societies taking unlawful oaths, &c. or electing committees, delegates, &c.

societies or clubs appointed or employed committees, delegates, &c. to confer or correspond with other societies or clubs, and to induce other persons to become members; and by such means maintained an influence over large bodies of men, and deluded many ignorant and unwary persons into the commission of acts highly criminal: and recites also, that certain societies or clubs, calling themselves *Spenceans*, or *Spencean Philanthropists*, professed for their object the confiscation and division of the land, and the extinction of the funded property of the kingdom; and that it was expedient and necessary that they should be utterly suppressed and prohibited as unlawful combinations and confederacies highly dangerous to the peace and tranquillity of the kingdom, and to the constitution of its government. And then it enacts, "That all societies or clubs calling themselves *Spen-* "*ceans*, or *Spencean Philanthropists*, and all other societies or clubs, by whatever name or description the same "are called or known, who hold and profess, or who shall "hold and profess, the same objects and doctrines, shall be, "and the same are hereby utterly suppressed and prohibited, as being *unlawful combinations and confederacies* "against the government of our sovereign lord the king, "and against the peace and security of his majesty's liege "subjects."

And also concerning *Spencean* societies or clubs, &c.

And the Spencean societies or clubs, &c. are suppressed and prohibited as unlawful combinations and confederacies.

57 Geo. III. c. 19. s. 25. Societies taking unlawful oaths, &c. or electing committees, delegates, &c. to be deemed unlawful combinations and confederacies.

The twenty-fifth section enacts, "That all and every the "said societies or clubs, and also all and every other society "or club now established, or hereafter to be established, "the members whereof shall be required or admitted to "take any oath or engagement which shall be an unlawful engagement within the meaning of the 37 Geo. III. "c. 123. (*d*) or within the meaning of the 52 Geo. III. "c. 104. (*e*) or to take any oath not required or authorized "by law; and every society or club, the members whereof, "or any of them, shall take or in any manner bind themselves by any such oath or engagement, on becoming, or

(*d*) *Ante*, 200. (*e*) *Ante*, 202.

" in order to become, or in consequence of being a member " or members of such society or club; and every society or " club, the members or any member whereof shall be re- " quired or admitted to take, subscribe, or assent to, or " shall take, subscribe, or assent to, any test or declaration " not required or authorized by law, in whatever manner " or form such taking or assenting shall be performed, whe- " ther by words, signs, or otherwise, either on becoming or " in order to become, or in consequence of being a member " or members of any such society or club; and every society " or club that shall elect, appoint, nominate, or employ any " committee, delegate or delegates, representative or repre- " sentatives, missionary or missionaries, to meet, confer, or " communicate with any other society or club, or with any " committee, delegate or delegates, representative or repre- " sentatives, missionary or missionaries, of such other so- " ciety or club, or to induce or persuade any person or per- " sons to become members thereof, shall be deemed and " taken to be *unlawful combinations and confederacies*, within " the meaning of the 39 Geo. III. c. 79. (*f*) and shall and " may be prosecuted, proceeded against, and punished, ac- " cording to the provisions of the said act; and every per- " son who, from and after the passing of this act, shall be- " come a member of any such society or club, or who, after " the passing of this act, shall act as a member thereof, and " every person who, from and after the passing of this act, " shall directly or indirectly maintain correspondence or " intercourse with any such society or club, or with any " committee or delegate, representative or missionary, or " with any officer or member thereof, as such, or who shall, " by contribution of money or otherwise, aid, abet, or sup- " port, such society or club, or any members or officers " thereof, as such, shall be deemed guilty of an unlawful " combination and confederacy within the intent and mean- " ing of the said 39 Geo. III. c. 79. and shall and may be " proceeded against, prosecuted, and punished, according to

(*f*) *Ante*, 366. *et sequ.*

" the provisions of the said act, with regard to the prosecu-
" tion and punishment of unlawful combinations and confe-
" deracies." (*g*)

57 G. III. c. 19. s. 26. The act is not to extend to lodges of Freemasons; nor to declarations approved by justices; nor to meetings or societies for charitable purposes.

Nothing contained in this act is to extend to lodges of Freemasons, complying with the regulations of the 39 Geo. III. c. 79; (*h*) nor to any declaration approved and subscribed by two or more justices of the peace, and confirmed by the major part of the justices at a general session, or at a general quarter sessions of the peace, pursuant to the regulations in the said act of the 39 Geo. III. c. 79.; (*i*) nor to meetings of *Quakers;* or to any meeting or society for purposes of a religious or charitable nature only, and in which no other matter or business shall be discussed. (*k*)

S. 28. Offence of persons permitting unlawful meetings.

Any person knowingly permitting any meeting of any society, or club, declared by this act to be an unlawful combination or confederacy, or of any division or committee of such society or club, to be held in any place belonging to him, or in his possession or occupation, is made liable, for the first offence, to a forfeiture of five pounds; and for any offence committed after the conviction for such first offence is to be deemed guilty of an *unlawful combination and confederacy* in breach of this act. (*l*)

S. 29. Licences of houses where they are held to be forfeited.

And two justices, upon evidence on oath that any such meeting, or any meeting for any seditious purpose, has been held at any house, &c. licensed for the sale of liquors, with the knowledge and consent of the person keeping such house, &c. may adjudge the licence to be forfeited. (*m*)

S. 30, 31, 32, 33. Recovery of penalties.

The thirtieth and three following sections of the act relate to the recovery of the pecuniary penalties, which may

(*g*) *Ante*, 369.

(*h*) *Ante*, 368.

(*i*) *Ante*, *Ibid.*

(*k*) 57 Geo. III. c. 19. s. 26.

(*l*) *Id.* s. 28. Section 13 of the 39 Geo. III. c. 79. is nearly similar.

(*m*) *Id.* s. 29. Section 14 of the 39 Geo. III. c. 79. is similar, except that it does not contain the words " with the knowledge and " consent of the person keeping " such house, &c."

be incurred under the act, their application, and the limitation of actions against justices, &c. for any thing done in pursuance of the act. Penalties exceeding 20*l.* may be recovered by action of debt; and those not exceeding 20*l.* may be recovered before a justice in a summary way.

and limitation of actions.

The thirty-fifth section enacts that nothing contained in the act shall be deemed to take away, or abridge, any provision already made by the law of the realm, for the suppression or punishment of any offence described in the act. And by the thirty-sixth section it is provided, that no person shall be prosecuted under the act, for having been a member of any illegal society, if such person shall not have acted as a member, after the passing of the act, but that the act shall not extend to prevent any prosecution, by indictment or otherwise, for any thing which shall be an offence within the act, and which might have been so prosecuted, if the act had not been made.

By s. 35. the act is not to affect other provisions made by law: And by s. 36. is not to operate against persons not having acted as members after the passing of the act.

The thirty-sixth section also provides that no person prosecuted and convicted, or acquitted, of any offence against the act, shall be liable to be again prosecuted for the same offence.

And by s. 36. persons prosecuted, not to be again prosecuted for the same offence.

The thirty-seventh section contains a provision, that where any proceeding or prosecution shall be instituted for any offence against the 39 Geo. III. c. 79. or this act, either by action or information, before any justice or justices, or otherwise, the attorney general in England, or the lord advocate in *Scotland*, may order them to be stayed; and in case of any judgment or conviction one of his Majesty's principal secretaries of state may, by an order under his hand, stay the execution of such judgment or conviction, or mitigate, or remit, any fine or forfeiture, or any part thereof.

S. 37. empowers the Attorney General or Lord Advocate to stay proceedings in certain cases: and a secretary of state to stay execution, or to mitigate the forfeiture.

The act does not extend to *Ireland*. And it was enacted,

that it might be repealed, or in any manner altered, during the session. (*n*)

Of places used for lectures and debates.

Several statutes have lately been passed, for the purpose of regulating places used for delivering lectures, and holding debates: but the enactments contained in them are for the most part of limited duration.

36 G. III. c. 8.

Many of the sections of the 36 Geo. III. c. 8. were intended to remedy the evil occasioned by persons who, under pretence of delivering lectures and discourses on public grievances, delivered lectures and discourses, and held debates, tending to stir up hatred and contempt of the king's person and government, and of the constitution: but this statute was limited to a duration of three years from the passing of the act, and until the end of the then next session of parliament. (*o*) It is referred to in the 39 Geo. III. c. 79. s. 15. which, reciting that divers places had been used for lectures or debates, which were not within the former act, but which lectures or debates had in many instances been of a seditious and immoral nature, and that other places had been used for seditious and immoral purposes, under the pretence of being places of meeting for the purpose of reading books, pamphlets, newspapers, or other publications, enacts, that every house, room, field, or other place at or in which any lecture or discourse shall be publicly delivered, or any public debate shall be had on any subject whatever, for the purpose of raising or collecting money, or any other valuable thing, from the persons admitted; or to which any person shall be admitted by payment of money, or by any ticket or token of any kind, delivered in consideration of money or other valuable thing, or in consequence of paying or giving, or having paid or given, or having agreed to pay or give, in any manner, any

39 G. III. c. 79. s. 15. Places of lecturing, debating, or reading, for the purpose of raising money, &c. to be deemed disorderly, unless previously licensed.

(*n*) S. 39, 40.

(*o*) The date of the act is the 18 December, 1795.

money or other valuable thing; or where any money or other valuable thing shall be received from any person admitted, either under pretence of paying for any refreshment, or other thing, or under any other pretence, or for any other cause, or by means of any device or contrivance whatever; and every house, &c. which shall be opened or used as a place of meeting, for the purpose of reading books, pamphlets, newspapers, or other publications, and to which any person shall be admitted by payment of money, or by any ticket, &c. (as before) shall be deemed *a disorderly house or place*, within the said act of 36 Geo. III. unless the same shall have been previously licensed in the manner afterwards mentioned in the act. And the persons by whom such house, &c. shall be opened or used, are to forfeit 100*l.* for every time of opening or using, and be otherwise punished as the law directs in cases of disorderly houses; and every person conducting the proceedings, debating, or furnishing books, &c.; and also every person giving or receiving money, &c. in respect of the admission to any such house, &c., or delivering out, or receiving, any tickets or tokens, knowing such house, &c. to be opened or used for any such purpose, is, for every such offence, to forfeit twenty pounds.

39 G. III. c. 79. s. 16. Who are liable as persons opening houses, &c.

It is further enacted that any person appearing as master, or as having the management of any such house, &c. shall be deemed to be a person by whom the same is opened, or used, and liable to be sued or prosecuted, though not the real owner or occupier. (*p*)

S. 17. Justices by information on oath, suspecting any place to be opened for lectures, &c. may demand admittance, and if refused, the place is to be

A power is also given to any justice who shall, by information upon oath, have reason to suspect that any house, &c. is opened or used for lectures, debates, reading, &c. contrary to the act, to go to such house, &c. and demand to be admitted; and in case of admittance being refused, such house, &c. is to be deemed a *disorderly house or place* within this act, and the said act of the 36 Geo. III. and the provisions in both the acts are to

(*p*) 39 Geo. III. c. 79. s. 16.

deemed disorderly, and the persons refusing to forfeit £20.

be applied to such house, &c. where such admittance shall have been so refused; and every person refusing, is to forfeit twenty pounds. (*q*)

S. 18. *et sequ.* as to licences for lectures, &c. and the power of justices to demand admittance to places licensed; and as to forfeiture of licence.

The eighteenth section of the act relates to the licensing any place for lecturing, or reading, by two or more justices at their general sessions, or at a special session held for the purpose; but gives a power to the justices at any general sessions to revoke such licence. And any justice may demand admittance to any licensed place; and, in case of refusal, such place is to be deemed, notwithstanding the licence, *a disorderly house or place*, within the act; and every person refusing such admittance is to forfeit twenty pounds. (*r*) It is also provided, that any two justices upon evidence, or oath, that any licensed place is commonly used for lectures or discourses of a seditious or immoral tendency, or that books, &c. of a seditious or immoral nature are there commonly kept, and delivered to be read, may declare the licence to have been forfeited. (*s*) Every house, &c. licensed for the sale of ale, or liquors, is to be deemed licensed for reading within the act; but two or more justices on evidence, on oath, that seditious or immoral publications are usually distributed there for the purpose of being read, may declare the licence for selling ale, or liquors, to have been forfeited. (*t*)

The act is not to extend to certain places.

The act is not to extend to lectures delivered in the universities by members, &c. or to lectures delivered in the hall of any of the inns of court by persons authorized; and payments to schoolmasters are not to be deemed payments for admission to lectures within the act. (*u*)

Prosecutions limited.

And prosecutions for any penalty imposed by the act are to be commenced within three months after it shall have been incurred. (*w*)

(*q*) 39 Geo. III. c. 79. s. 17.
(*r*) *Id.* s. 19.
(*s*) *Id.* s. 20.
(*t*) *Id.* s. 21.
(*u*) *Id.* s. 22.
(*w*) *Id.* s. 34.

A recent act, 57 Geo. III. c. 19. contains several sections respecting lectures and debates, (*x*) in substance nearly similar to those of the 39 Geo. III. c. 79. which have been just stated; but it does not relate to houses, &c. "for *reading* books, pamphlets, newspapers, or other publications." And these provisions of the 57 Geo. III. are limited in duration to the 24th July 1818. (*y*) Prosecutions also for any thing done contrary to them must be commenced within six months after the offence committed. (*z*)

57 Geo. III. c. 19.

The statute 13 Car. II. c. 5. reciting the mischiefs of *tumultuous petitioning*, enacts, that no person shall solicit or procure the getting of hands or other consent of any persons above the number of twenty, to any petition, &c. to the king or the houses of parliament, for alteration of matters established by law in church or state, unless the matter thereof shall have been first consented unto and ordered by three justices, or by the major part of the grand jury of the county, &c. at the assizes or quarter sessions; or, in *London*, by the lord mayor, aldermen, and common council: and that no person shall repair to his majesty or the houses of parliament, upon pretence of presenting or delivering any petition, &c. accompanied with excessive number of people, nor at any one time with above the number of ten persons; upon pain of incurring a penalty not exceeding one hundred pounds, and three months' imprisonment for every offence; such offence to be prosecuted in the court of king's bench, or at the assizes or quarter sessions, within six months, and proved by two credible witnesses. (*a*) But there is a proviso, that the act shall not hinder persons, not exceeding ten in number, from presenting any public or private grievance or complaint to any member of parliament, or to the king, for any remedy to be thereupon had: nor extend to any ad-

13 Car. II. st. 1. c. 5. as to tumultuous petitioning.

(*x*) 57 Geo. III. c. 19. s. 14. to s. 20.

(*y*) *Id.* s. 22.

(*z*) *Id.* s. 21.

(*a*) 13 Car. II. st. 1. c. 5. s. 2.

dress to his majesty by the members of the houses of parliament, during the sitting of parliament. (*b*)

Suppression of riots.

By common law.

The common law, and also several more ancient statutes than those which have been mentioned, authorize proceedings for the restraining and suppression of riots. By the common law the sheriff, under-sheriff, constable, or any other peace officer, may, and ought to do, all that in them lies towards the suppressing of a riot, and may command all other persons to assist them: and by the common law also any private person may lawfully endeavour to appease such disturbances by staying the persons engaged from executing their purpose, and also by stopping others coming to join them. (*c*) It has been holden also, that private persons may arm themselves in order to suppress a riot; (*d*) from whence it seems clearly to follow that they may also make use of arms in suppressing it, if there be a necessity. However, it may be very hazardous for private persons to proceed to these extremities; and such violent methods seem only proper against such riots as savour of rebellion. (*e*) But if a felony be about to be committed, the interference of private persons will be justifiable; for a private person may do any thing to prevent the perpetration of a felony. (*f*) In the riots which took place in the year 1780 this matter was much misunderstood, and a general persuasion prevailed that no indifferent person could interpose without the autho-

(*b*) 13 Car. II. st. 1. c. 5. s. 3. By 1 W. and M. sess. 2. c. 2. s. 1. art. 5. usually styled the Bill of Rights, it is enacted, "That it is the right "of the subjects to petition the "king, and that all commitments "and prosecutions for such peti- "tioning are illegal." It was contended, that this article had virtually repealed the statute 13 Car. II. c. 5. but Lord Mansfield declared it to be the unanimous opinion of the court, that neither that nor any other act of parliament had repealed it, and that it was in full force. Rex *v.* Lord George Gordon, Dougl. 571.

(*c*) 1 Hawk. P. C. c. 65. s. 11.

(*d*) Case of arms, Poph. 121. Kel. 76.

(*e*) 1 Hawk. P. C. c. 65. s. 11.

(*f*) By Chambre, J. in Handcock *v.* Baker and others, 2 Bos. and Pul. 265.

rity of a magistrate; in consequence of which much mischief was done, which might otherwise have been prevented. (*g*)

Suppression of riots.—By statutes.

The statute 34 Edw. III. c. 1. empowers justices of the peace to restrain and arrest rioters; and, having been construed liberally, it has been resolved, that a single justice may arrest persons riotously assembled, and may also authorize others to arrest them by a parol command. By the statute 13 Hen. IV. c. 7. s. 1. the justices of the peace, three, or two of them at the least, and the sheriff or under-sheriff of the county where any riot, assembly, or rout, of people against the law shall be made, shall come with the power of the county (if need be) to arrest them; and shall arrest them; and shall have power to record that which they shall find so done in their presence against the law: and by such record the offenders shall be convicted in the same manner as is contained in the statute of forcible entries. (*h*) In the interpretation of this statute it has been holden, that all persons, noblemen and others, except women, clergymen, persons decrepit, and infants under fifteen, are bound to attend the justices in suppressing a riot, upon pain of fine and imprisonment; and that any battery, wounding, or killing the rioters, that may happen in suppressing the riot, is justifiable. (*i*)

Of the indictment and trial.

An indictment for a riot must shew for what act the rioters assembled, that the court may judge whether it was lawful or not: (*k*) and it must state that the defendants un-

(*g*) By Heath, J. in Handcock *v.* Baker and others, 2 Bos. and Pul. 265.

(*h*) 5 R. II. stat. 1. c. 7.

(*i*) 4 Blac. Com. 146, 147. 1 Hale 495. The statutes 17 R. II. c. 8. 2 H. V. c. 8. and 19 H. VII. c. 13. relate also to the summary proceedings of justices, &c. in cases of riots, which it is not thought necessary to mention further in this work. The different statutes and the construction put upon them may be seen in 1 Hawk. P. C. c. 65. s. 14. *et sequ.* and 5 Burn. *Riots, &c.* II, III, IV, V. The statutes 2 H. V. c. 8. 2 H. V. c. 9. and 2 H. VI. c. 14. relate to process out of chancery in cases of riots.

(*k*) Reg. *v.* Gulston and others, 2 Lord Raym. 1210.

lawfully assembled; for a riot is a compound offence: there must be not only an unlawful act to be done, but an unlawful assembly of more than two persons. (*l*) In a case where six persons being indicted for a riot, two of them died without being tried, two were acquitted, and the other two were found guilty, the court refused to arrest the judgment, saying, that as the jury had found two persons to be guilty of a riot, it must have been together with those two who had never been tried, as it could not otherwise have been a riot. (*m*) But as two persons only cannot be guilty of a riot, it was held, that where several were indicted, and all but two were acquitted, no judgment could be given against the two. (*n*) And though the indictment in this case charged a battery upon an individual as well as a riot, and it was argued that the *riotose, &c.* was only to express the manner of the assault, and a kind of aggravation of the offence, it was held that the two persons could not be intended to be guilty of the battery; that the offence was special and laid as a riot, the *riotose* extending to all the facts, and the battery being but part of the riot; so that the defendants being acquitted of the riot were acquitted of the whole of which they were indicted. But it was also held, that if the indictment had been, that the defendants, with *divers other* disturbers of the peace, had committed this riot and battery, and the verdict had been as in this case, the king might have had judgment. (*o*)

Where several were indicted for a riot, it was moved, that the prosecutor might name two or three, and try it against them, and that the rest might enter into a rule to plead not guilty *(guilty if the others were found guilty;)* and a rule

(*l*) Reg. *v.* Soley et al. 2 Salk. 593, 594.

(*m*) Rex *v.* Scott and another, 3 Burr. 1262.

(*n*) Rex *v.* Sadbury and others, 1 Lord Raym. 484. and see 19 Vin. Abr. *Riots*, (E) 1.

(*o*) Rex *v.* Sadbury and others, 1 Lord Raym. 484. S. C. 2 Salk. 593. pl. 2. and 12 Mod. 262. 19 Vin. Abr. *Riots*, (E) 6.

was made accordingly: this being to prevent the charges in putting them all to plead. (*p*)

The *punishment* for offences of the nature of riots, routs, or unlawful assemblies, at common law, is fine and imprisonment, in proportion to the circumstances of the offence: (*q*) and formerly, in cases of great enormity, it appears that the offenders were sometimes punished with the pillory; (*r*) but such punishment is now taken away by the statute 56 Geo. III. c. 138. Punishment.

(*p*) Anon. 3 Salk. 317. Regin. v. Middlemore, 6 Mod. 212.

(*q*) 1 Hawk. P. C. c. 65. s. 12.

(*r*) *Id. Ibid.*

CHAPTER THE TWENTY-SEVENTH.

Of Affrays.

AFFRAYS are the fighting of two or more persons in some public place, to the terror of his majesty's subjects. (*a*) The derivation of the word affray is from the French *effrayer*, to terrify; and as in a legal sense it is taken for a public offence to the terror of the people, it seems clearly to follow that there may be an assault which will not amount to an affray: as where it happens in a private place, out of the hearing or seeing of any except the parties concerned; in which case it cannot be said to be to the terror of the people. (*b*) And there may be an affray which will not amount to a riot, though many persons be engaged in it; as if a number of persons, being met together at a fair or market, or on any other lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, it seems agreed that they will not be guilty of a riot, but only of a sudden affray, of which none are guilty but those who actually engage in it; and this on the ground of the design of their meeting being innocent and lawful, and the subsequent breach of the peace happening unexpectedly without any previous intention. (*c*) An affray differs also from a riot in this, that *two* persons only may be guilty of it; whereas three persons at least are necessary to constitute a riot, as has been shewn in the preceding chapter.

(*a*) 4 Blac. Com. 144. 3 Inst. 158. 1 Burn. Just. *Affray*, 1.

(*b*) 1 Hawk. P. C. c. 63. s. 1. In 3 Inst. it is said that an affray is a public offence to the terror of the king's subjects; and is an English word, and so called because it affrighteth and maketh men afraid; and is enquirable in a leet as a common nuisance.

(*c*) 1 Hawk. P. C. c. 65. s. 3.

Aggravated affrays.

An affray may be much aggravated by the circumstances under which it takes place, either, first, in respect of its dangerous tendency; secondly, in respect of the persons against whom it is committed; or, thirdly, in respect of the place in which it happens.

An affray may receive an aggravation from its dangerous tendency; as where persons coolly and deliberately engage in a duel which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves. (*d*) And an affray may receive an aggravation from the persons against whom it is committed; as where the officers of justice are violently disturbed in the due execution of their office, by the rescue of a person legally arrested, or the bare attempt to make such a rescue; the ministers of the law being under its more immediate protection (*e*) And further, an affray may receive an aggravation from the place in which it is committed; it is therefore severely punishable when committed in the king's courts, or even in the palace-yard near those courts: and it is highly fineable when made in the presence of any of the king's inferior courts of justice. (*f*) And, upon the same account also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated. (*g*)

(*d*) 1 Hawk. P. C. c. 63. s. 21. This would apply to such duels as were fought in ancient times, and to such as have been occasionally heard of, in more modern days, in neighbouring countries, fought amidst a number of spectators. But *qu.* if a duel, as usually conducted in this country of late years, would be an affray?

(*e*) *Id.* s. 22. And see *post.* Chap. on *Rescue.*

(*f*) 1 Hawk. P. C. c. 21. s. 6. 10. c. 63. s. 23. As to striking in the courts of justice see *post*, Book III. Chap. on *Aggravated Assaults.*

(*g*) 1 Hawk. P. C. c. 63. s. 23. And see *post*, Chap. XXIX. *Of Disturbances in Places of Public Worship.*

Words will not make an affray.

It is said, that no quarrelsome or threatening words whatsoever can amount to an affray; and that no one can justify laying his hands on those who shall barely quarrel with angry words, without coming to blows: but it seems that a constable may, at the request of the party threatened, carry the person who threatens to beat him before a justice, in order to find sureties. And granting that no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at common law, and is strictly prohibited by several statutes. (*h*)

But there may be an affray where there is no actual violence, as where a person goes armed.

2 Edw. III. c. 3. Persons prohibited from going armed.

The principal of these statutes is 2 Edw. III. c. 3. sometimes spoken of as the statute of *Northampton*. It enacts, that no man, of what condition soever, except the king's servants in his presence, and his ministers in executing their office, and such as be in their company assisting them, and also upon a cry made for arms to keep the peace, shall come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring any force in affray of peace, (*i*) nor go nor ride armed, by night or day, in fairs or markets, or in the presence of the king's justices, or other ministers, or elsewhere; upon pain to forfeit their armour to the king, and their bodies to prison at the king's pleasure. The statute also provides, that the king's justices in their presence, sheriffs, and other ministers in their bailiwics, lords of franchises and their bailiffs in the same, and mayors and bailiffs of cities and boroughs within the same, and borough-holders, constables, and wardens of the

(*h*) 1 Hawk. P. C. c. 63. s. 2. 4.

(*i*) The words of the statute are *en affrai de la pees*. But Lord Coke, in 3 Inst. 158. cites it as *en effraier de la pais*, and observes, that the writ grounded upon the statute says *in quorundam de populo terrorem*, and that therefore the printed book (*en affray de la peace*) should be amended.

peace within their wards, shall have power to execute the act: and that the judges of assize may enquire and punish such officers as have not done that which pertained to their office. This statute is further enforced by 7 Rich. II. c. 13. and by the 20 Rich. II. c. 1. which adds the further punishment of a fine.

Construction of 2 Edw. III. c. 3. as to persons going armed.

In the exposition of this statute of Edw. III. it has been holden, that no wearing of arms is within its meaning, unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons, or having their usual number of attendants with them for their ornament or defence, in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace. (*k*) And no person is within the intention of the statute, who arms himself to suppress dangerous rioters, rebels, or enemies, and endeavours to suppress or resist such disturbers of the peace and quiet of the realm. (*l*) But a man cannot excuse wearing such armour in public by alledging that a person threatened him, and that he wears it for the safety of his person from the assault; though no one will incur the penalty of the statute, for assembling his neighbours and friends in his own house, against those who threaten to do him any violence therein, because a man's house is as his castle. (*m*)

It may be useful to mention shortly the acts which may be done for the suppression of an affray, by a private person, by a constable, or by a justice of peace.

(*k*) 1 Hawk. P. C. c. 63. s. 9.

(*l*) *Id.* s. 10.

(*m*) *Id.* s. 8. and see in s. 5, 6, 7. as to the proceedings of justices, &c. executing the act.

Of the suppression of affrays by a private person.

It seems to be agreed, that any one who sees others fighting may lawfully part them, and also stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of peace, in order to their finding sureties for the peace; and it is said that any private person may stop those whom he shall see coming to join either party. (*n*) And it seems to be clear that if either party be dangerously wounded in such an affray, and a stander by, endeavouring to arrest the other, be not able to take him without hurting, or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace. (*o*)

Of the suppression of affrays by a constable.

It seems agreed, that a constable is not only impowered, as all private persons are, to part an affray which *happens in his presence;* but is also bound, at his peril, to use his best endeavours for this purpose; and not only to do his utmost himself, but also to demand the assistance of others, which, if they refuse to give him, they are punishable with fine and imprisonment. And it is laid down in the books, that if an affray be in a house, the constable may break open the doors to preserve the peace, and if affrayers fly to a house, and he follow with fresh suit, he may break open the doors to take them. (*p*) And so far is the constable in-

(*n*) 1 Hawk. P. C. c. 63. s. 11. Where it is said that from hence it seems clearly to follow, that if a man receive a hurt from either party, in thus endeavouring to preserve the peace, he shall have his remedy by an action against him: and that upon the same ground it seems equally reasonable that if he unavoidably happen to hurt either party, in thus doing what the law both allows and commends, he may well justify it; inasmuch as he is no way in fault, and the damage done to the other was occasioned by a laudable intention to do him a kindness.

(*o*) *Id.* s. 12. 3 Inst. 158.

(*p*) 1 Hawk. P. C. c. 63. s. 13. 16. But qu. if a constable can

trusted with a power over all actual affrays, that, though he himself is a sufferer by them, and therefore liable to be objected against, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself, but also imprison the offender in the same manner as if he were in no way a party. (*q*) It is said also that if a constable see persons either actually engaged in an affray, as by striking, or offering to strike, or drawing their weapons, &c. or upon the very point of entering upon an affray, as where one shall threaten to kill, wound, or beat another, he may either carry the offender before a justice of the peace, to the end that such justice may compel him to find sureties for the peace, &c. or he may imprison him of his own authority for a reasonable time till the heat be over, and also afterwards detain him till he find such surety by obligation. But it seems that he has no power to imprison such an offender in any other manner, or for any other purpose; for he cannot justify the committing an affrayer to gaol till he shall be punished for his offence; and it is said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal hurt; and that all which he can do in such a case, is to command them, under pain of imprisonment, to avoid fighting. (*r*)

But it seems to be the better opinion, that a constable has no power to arrest a man for an affray done *out of his own view*, without a warrant from a justice of peace, unless a felony be done, or likely to be done; for it is the proper business of a constable to preserve the peace, not to punish the breach of it; nor does it follow, from his having

safely break open the doors of a dwelling house in such case, without a magistrate's warrant? At least, it should seem, there must be some circumstances of extraordinary violence in the affray to justify him in so doing.

(*q*) 1 Hawk. P. C. c. 63. s. 15.

(*r*) *Id.* s. 14.

power to compel those to find sureties who break the peace in his presence, that he has the same power over those who break it in his absence; inasmuch as in such case it is most proper to be done by those who may examine the whole circumstances of the matter upon oath, which a constable cannot do: yet it is said that he may carry those before a justice of peace, who were arrested by such as were present at an affray, and delivered by them into his hands. (*s*)

Of the suppression of affrays by a justice of peace.

There is no doubt but that a justice of peace may and must do all such things for the suppression of an affray, which private men or constables are either enabled or required by the law to do: but it is said that he cannot, without a warrant, authorize the arrest of any person for an affray out of his view. Yet it seems clear, that in such case he may make his warrant to bring the offender before him, in order to compel him to find sureties for the peace. Also it seems that a justice of peace has a greater power over one who has dangerously wounded another in an affray, than either a private person or a constable; for there does not seem to be any good authority, that these have any power to take sureties of such an offender; but it seems certain that a justice of the peace has a discretionary power, either to commit him, or to bail him till the year and day be past. It is said, however, that a justice ought to be very cautious how he takes bail, if the wound be dangerous; since, if the party die, and the offender do not appear, the justice is in danger of being severely fined, if

(*s*) 1 Hawk. P. C. c. 63. s. 17. It is submitted that a constable cannot, in a case of affray, arrest without a warrant from a magistrate, unless he sees an actual breach of the peace committed; or, in other words, *flagrante delicto*. He cannot arrest of his own authority after the affray is over. See the argument of Best, Serjt. and the judgment of Mansfield, C. J. in Clifford *v.* Brandon, 2 Campb. 367. 371. and see Reg. *v.* Tooley and others, 2 Lord Raym. 1296. and *post*, Book III. Chap. III. on *Manslaughter*, S. 4.

upon the whole circumstances of the case he has been too favourable. (*t*)

Punishment of affrays.

The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case: for where there is any material aggravation, the punishment will be proportionably increased. (*u*)

(*t*) 1 Hawk. P. C. c. 63. s. 19. P. C. c. 63. s. 20.
(*u*) 4 Blac. Com. 145. 1 Hawk.

CHAPTER THE TWENTY-EIGHTH.

Of Challenging to Fight.

IT is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavour to provoke another to send a challenge, or to fight; as by dispersing letters, for that purpose, full of reflections, and insinuating a desire to fight. (*a*) And it will be no excuse for a party so offending, that he has received provocation: for as, if one person should kill another, in a deliberate duel, under the provocation of charges against his character and conduct ever so grievous, it will be murder in him and his second, the bare incitement to fight, though under such provocation, is in itself a very high misdemeanor, though no consequence ensue thereon against the peace. (*b*)

Of endeavouring to provoke another to send a challenge.

The offence of endeavouring to provoke another to send a challenge to fight was much considered in a modern case, in which it was held to be an indictable misdemeanor: and more especially as such provocation was given in a letter containing libellous matter, and as the prefatory part of the indictment alleged that the defendant intended to do the party bodily harm, and to break the king's peace. (*c*) And

(*a*) 1 Hawk. P. C. c. 63. s. 3. 3 Inst. 158. 4 Blac. Com. 150. Hicks's case, Hob. 215.

(*b*) Rex *v.* Rice, 3 East. 581.

(*c*) Rex *v.* Phillips, 6 East. 464. The letter was, "Sir—It will, I "conclude, from the description "you gave of your feelings and "ideas with respect to insult, in "a letter to Mr. *Jones*, of 1st "Monday's date, be sufficient for "me to tell you, that in the whole "of the *Carmarthenshire* election "business, as far as it relates to

the sending such letter was held to be an act done towards the procuring the commission of the misdemeanor meant to be accomplished. (*d*) In this case, with respect to the *intent* of the defendant, the rule was adopted that where an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved; though it is sufficient to allege it in the prefatory part of the indictment: but that where the act is in itself unlawful, the law infers an evil intent, and the allegation of such intent is merely matter of form, and need not be proved by extrinsic evidence on the part of the prosecution. (*e*)

Of the intent.

It has been considered that mere words of provocation, as "liar" and "knave," though motives and *mediate* provocation for a breach of the peace, yet do not tend *immediately* to the breach of the peace, like a challenge to fight, or a threatening to beat another. (*f*) But words which directly tend to a breach of the peace may be indictable; as if one man challenges another by words; (*g*) and if it can be proved that the words used were intended to provoke the party, to whom they were addressed, to give a challenge, the case would seem to fall within the same rule. (*h*)

Of words of provocation.

With respect to challenges given on account of money won by gaming, it is enacted by 9 Ann. c. 14. s. 8. that whoever shall challenge or provoke to fight any other person or persons whatsoever upon account of any money won by gaming, playing, or betting, at any of the games mentioned

9 Ann. c. 14. s. 8. challenges on account of money won by gaming.

"me, you have behaved like a "blackguard. I shall expect to "hear from you on this subject, "and will punctually attend to "any appointment you may think "proper to make."

(*d*) See *ante*, 61, 62.

(*e*) Rex *v.* Phillips, 6 East. 470. to 475.

(*f*) King's case, 4 Inst. 181.

(*g*) Regin. *v.* Langley, 6 Mod. 125 S. C. 2 Lord Raym. 1031.

(*h*) The rule given in 3 Inst. 158. is—"Quando aliquid prohibetur, "prohibetur et omne per quod "devenitur ad illud."

in the act,(*i*) shall, upon conviction by indictment or information, forfeit all their goods, chattels, and personal estate, and suffer imprisonment without bail, in the county prison, for two years.

The venue may be in the county in which the challenge is put into the post-office.

In a case where a person wrote a letter with intent to provoke a challenge, sealed it up, and put it into the two-penny post-office in a street in *Westminster*, addressed to the prosecutor in the city of *London*, by whom it was there received; Lord Ellenborough, C. J. held that the defendant might be indicted in *Middlesex*, as there was a sufficient publication in that county by putting the letter into the post-office there, with intent that it should be delivered to the prosecutor elsewhere; and that if the letter had never been delivered, the defendant's offence would have been the same. (*k*)

Of proceeding by criminal information.

It may be observed, before this subject is concluded, that sending a challenge is an offence for which the court of King's Bench will grant a criminal information: but in a case where it appeared, upon the affidavits, that the party applying for an information had himself given the first challenge, the court refused to proceed against the other party by way of information; and left the prosecutor to his ordinary remedy by action or indictment. (*l*) A rule to shew cause why such an information should not be granted has been made, upon producing *copies* only of the letters in which the challenge was contained, such copies being sufficiently verified. (*m*)

Punishment.

The punishment for this offence, as a misdemeanor, is dis-

(*i*) In the first section of the act the words are "cards, dice, tables, "tennis, bowls, or other game or "games whatsoever."

(*k*) Rex *v.* Williams, 2 Campb. 506.

(*l*) Rex *v.* Hankey, 1 Burr. 316. where it is said that the court held that it might have been right to have granted even *cross informations*, in case each party had applied for an information against the other.

(*m*) Rex *v.* Chappel, 1 Burr. 402

cretionary, and must be guided by such circumstances of aggravation or mitigation, as are to be found in each particular case. (*n*)

(*n*) Rex *v.* Rice, 3 East. 584. in which case the defendant (though he had undergone some imprisonment, and though there were several circumstances tending materially to mitigate his offence,) was sentenced to pay a fine of 100*l.* and to be imprisoned for one calendar month, and at the expiration of that time to give security to keep the peace for three years, himself in 1000*l.* and two sureties in 250*l.* each, and to be further imprisoned till such fine was paid and such securities given. Hawkins, speaking of the pernicious consequences of duelling, says, "upon which considerations persons convicted of barely sending a challenge have been adjudged to pay a fine of 100*l.* and to be imprisoned for one month without bail, and also to make a public acknowledgment of their offence, and to be bound to their good behaviour." 1 Hawk. P. C. c. 63. s. 21.

CHAPTER THE TWENTY-NINTH.

Of Disturbances in Places of Public Worship.

IT has been already stated that affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated;(*a*) and upon this consideration all irreverent behaviour in these places has been esteemed criminal by the makers of our laws. So that many disturbances occurring in these places are visited with punishment which, if they happened elsewhere, would not be punishable at all; as bare quarrelsome words: and some acts are criminal, which would be commendable if done in another place; as arrests by virtue of legal process. (*b*)

Several statutes have been passed for the purpose of preventing disturbances in places of worship belonging to the established church, and also in those belonging to congregations of Protestant Dissenters and Roman Catholics.

5 & 6 Edw. VI. c. 4. as to quarrelling, chiding, or brawling in a church or church-yard,

The 5 & 6 Edw. VI. c. 4. enacts, "That if any person "whatsoever shall, by words only, quarrel, chide, or brawl, "in any church or church-yard, that then it shall be lawful "unto the ordinary of the place where the offence shall be "done, and proved by two lawful witnesses, to suspend "every person so offending; that is to say, if he be a lay-"man, *ab ingressu ecclesiæ*, and if he be a clerk, from the "ministration of his office, for so long time as the said or-"dinary shall by his discretion think meet and convenient, "according to the fault."

(*a*) *Ante*, 389. (*b*) 1 Hawk. P. C. c. 63. s. 23.

By the second section of the same statute "if any person "or persons shall smite or lay violent hands upon any other, "either in any church or church-yard, then *ipso facto* every "person so offending shall be deemed excommunicate, and "be excluded from the fellowship and company of Christ's "congregation."

S. 2. Smiting or laying violent hands in church or church-yard.

And the third section enacts, "That if any person shall "maliciously strike any person with any weapon in any "church or church-yard, or shall draw any weapon in any "church or church-yard, to the intent to strike another with "the same weapon, that then every person so offending, "and thereof being convicted, by verdict of twelve men, or "by his own confession, or by two lawful witnesses, before "the justices of assize, justices of oyer and terminer, or "justices of peace in their sessions, by force of this act, "shall be adjudged by the same justices before whom such "person shall be convicted to have one of his ears cut off:" then after providing for the offender being branded, in case he shall have no ears, it concludes "and besides that every "such person to be and stand *ipso facto* excommunicated as "is aforesaid."

S. 3. Striking with a weapon in a church or church-yard, or drawing one with intent to strike.

In the construction of this statute it has been held that the ecclesiastical court may proceed upon the two first sections, and is not to be prohibited; for though the offence mentioned in the second section of smiting in the church or church-yard is still an offence at common law, and the offender may be indicted for it; yet besides this, he may, by the act, be *ipso facto* excommunicated. (*c*) No previous conviction is necessary in this case; though, if there be one, the ordinary may use it as proof of the fact. But before the ecclesiastical court can proceed for the offence, in the third section, of maliciously striking, &c. there must be a previous conviction, and a transmission of the sentence to the ordinary. (*d*) Indeed, if the ecclesiastical court pro-

Construction of the statute.

(*c*) Wilson, Clerk, *v.* Greaves, 1 Burr. 240. (*d*) *Id. Ibid.*

ceeds for damages on either clause, the court of King's Bench will prohibit them; for the proceedings of the ecclesiastical court are *pro salute animæ*. (*e*)

Cathedral churches, and the church-yards which belong to them, are within this statute. (*f*) And it has been held that it will be no excuse for a person who strikes another in a church, &c. to shew that the other assaulted him. (*g*) But church-wardens, or perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. (*h*)

M. sess. 2. c. 3. as to disturbances during the time of divine service.

The statute 1 Mary, sess. 2. c. 3. enacts "that if any per-
"son or persons, of their own power and authority, do and
"shall willingly and of purpose, by open and overt word,
"fact, act, or deed, maliciously or contemptuously molest,
"let, disturb, vex, or trouble, or by any other unlawful
"ways or means disquiet or misuse, any preacher or
"preachers, licensed, allowed, or authorized, to preach by
"the Queen's highness, or by any archbishop or bishop of
"this realm, or by any other lawful ordinary, or by any of
"the universities of Oxford and Cambridge, or otherwise
"lawfully authorized or charged by reason of his or their
"cure, benefice, or other spiritual promotion or charge, in
"any of his or their open sermon, preaching, or collation,
"that he or they shall make, declare, preach, or pronounce,
"in any church, chapel, church-yard, or in any other place
"or places, used, frequented, or appointed, or that here-
"after shall be used or appointed to be preached in; or if
"any person or persons shall maliciously, willingly, or of
"purpose, molest, let, disturb, vex, disquiet, or otherwise

(*e*) Wilson, Clerk, *v.* Greaves, 1 Burr. 240. And by Lord Mansfield, C. J. in the same case "We "proceed to *punish*, they to "*amend*."

(*f*) Dethick's case, 1 Leon. 248.

(*g*) 1 Hawk. P. C. c. 63. s. 28.

(*h*) 1 Hawk. P. C. c. 63. s. 29.

" trouble, any parson, vicar, parish-priest, or curate, or any " lawful priest, preparing, saying, doing, singing, minis- " tering, or celebrating, the mass, or other such divine ser- " vice, sacraments or sacramentals, as was most commonly " frequented and used in the last year of the reign of the " late sovereign lord king Henry the eighth, or that at any " time hereafter shall be allowed, set forth, or authorized, " by the Queen's majesty; or if any person or persons shall " unlawfully, contemptuously, or maliciously, of their own " power or authority, pull down, deface, spoil, or otherwise " break, any altar or altars, or any crucifix or cross, in any " church, chapel, or church-yard," every such offender, his aiders, procurers, or abettors, may be apprehended by any constable or churchwarden of the place where such offence shall be committed, or by any other officer or person then being present at the time of the said offence, and being so apprehended, shall be brought before some justice of peace, by whom he shall upon due accusation be committed forthwith; and within six days next after the accusation the said justice with one other justice shall diligently examine the offence; and if the two justices find the person guilty, by proof of two witnesses, or confession, they shall commit him to gaol for three months, and further to the quarter sessions next after the end of the three months; at which sessions he is upon repentance to be discharged, finding surety for his good behaviour for a year; and if he will not repent he is to be further committed till he does. (*i*)

It has been resolved, that the disturbance of a minister in saying the present common prayer is within this statute; for the express mention of such divine service as should be afterwards authorized by queen Mary impliedly includes such service also as should be authorized by her successors, upon the principle that as the king never dies a prerogative given generally to one goes of course to others. (*k*)

(*i*) 1 Mar. sess. 2. c. 3. s. 2, 3, 4, 5, 6.

(*k*) 1 Hawk. P. C. c. 63. s. 31. Gibs. 372.

Rescuing offenders, or hindering their arrest.

Escape of offenders.

The statute further provides, that persons rescuing offenders so apprehended as aforesaid, or hindering the arrest of offenders, shall suffer like imprisonment, and pay a fine of five pounds for each offence. (*l*) And if any offenders be not apprehended, but escape, the escape is to be presented at the quarter sessions, and the inhabitants of the parish where the escape was suffered are to forfeit five pounds. (*m*)

Precedents are to be met with of indictments for breaking the windows of a church, by firing a gun against them; (*n*) but it has been doubted whether such an indictment is sustainable; as being for a mere trespass. (*o*)

The arrest of a clergyman in any church or church-yard, while attending to Divine service, makes the offender liable to imprisonment and ransom at the king's will, and gree to the party arrested. (*p*)

1 W. and M. c. 18. Disturbing dissenting congregations.

The statute 1 W. and M. c. 18. s. 18. which was passed for the purpose of exempting Protestants dissenting from the church of England from the penalties of certain laws therein mentioned, enacts, "That if any person or persons shall, will-"ingly and of purpose, maliciously or contemptuously, come "into any cathedral or parish church, chapel, or other con-"gregation permitted by this act, and disquiet or disturb "the same, or misuse any preacher or teacher; such person "or persons, upon proof thereof before any justice of peace, "by two or more sufficient witnesses, shall find two sureties "to be bound by recognizance in the penal sum of fifty "pounds; and in default of such sureties shall be committed "to prison, there to remain till the next general or quarter "sessions; and upon conviction of the said offence at the

(*l*) S. 7.

(*m*) S. 8.

(*n*) 2 Chit. Crim. L. 23.

(*o*) *Id. Ibid.* And see *ante*, 70.

(*p*) 50 Edw. III. c. 5. 1 R. II. c. 15. But the arrest notwithstanding, if not on a *Sunday*, is good in law. Wats. c. 34. 5 Burn. Just. *Public Worship*, p. 111.

" said general or quarter sessions, shall suffer the pain and " penalty of twenty pounds," to the use of the king.

Before this statute the court of King's Bench refused to grant a certiorari to remove an indictment at the sessions for a person not behaving himself modestly and reverently at the church during divine service; for, although the offence was punishable by ecclesiastical censures, the court considered it properly to come within the cognizance of the justices of the peace. (*q*) An indictment upon the statute, found at the quarter sessions, may be removed by certiorari before verdict, notwithstanding the words of the statute, which seem at the first view to confine the cognizance of the offence to the justices in the first instance, and in the next to the quarter sessions. (*r*)

Points decided upon this statute.

The oaths taken by a preacher under this act are matter of record, and cannot be proved by parol evidence; but it is not necessary, upon an indictment for disturbing a dissenting congregation, to prove that the minister has taken the oaths. (*s*) It is no defence to such an indictment that the defendant committed the outrage for the purpose of asserting his right to the situation of clerk. (*t*) And it has been held that a congregation of foreign Lutherans, conducting the service of their chapel in the German language, are within the protection of the statute. (*u*) Upon the conviction of several defendants, each of them is liable to a penalty of twenty pounds. (*w*)

52 Geo. III. c. 155. further provision against the disturbance of religious assemblies.

A late statute makes further provision for the punishment of persons disturbing religious assemblies; and enacts, " that " if any person or persons do and shall wilfully and mali- " ciously or contemptuously disquiet or disturb any meet-

(*q*) Rex *v.* ——, 1 Keb. 491. 5 Burn. Just. *Public Worship*, p. 111.
(*r*) Rex *v.* Hube, 5 T. R. 542.
(*s*) Rex *v.* Hube, Peake R. 131.
(*t*) *Id. Ibid.*
(*u*) *Id. Ibid.*
(*w*) Rex *v.* Hube, 5 T. R. 542.

" ing, assembly, or congregation of persons assembled for " religious worship, permitted or authorized by this act, or " any former act or acts of parliament, or shall in any way " disturb, molest, or misuse any preacher, teacher, or per- " son officiating at such meeting, assembly, or congregation, " or any person or persons there assembled: such person or " persons so offending, upon proof thereof before any jus- " tice of the peace by two or more credible witnesses, shall " find two sureties to be bound by recognizances in the " penal sum of fifty pounds to answer for such offence; and " in default of such sureties shall be committed to prison, " there to remain till the next general or quarter sessions; " and upon conviction of the said offence at the said general " or quarter sessions shall suffer the pain and penalty of " forty pounds." (*x*) A subsequent section of the statute provides that nothing contained in the act shall extend to *Quakers*, nor to any meetings or assemblies for religious worship held or convened by them. (*y*)

Certiorari.

It has been holden upon this statute, in conformity to the decision which has been mentioned upon the 1 W. and M. c. 18. (*z*) that an indictment found at the quarter sessions may be removed into the court of King's Bench by *certiorari* before trial. (*a*)

31 Geo. III. c. 32. disturbing Roman Catholic congregations.

A similar provision to that contained in the 1 W. and M. c. 18. s. 18. (*b*) relating to Protestant dissenters, is enacted in the 31 Geo. III. c. 32. s. 10. with respect to *Roman Catholic* congregations, or assemblies of religious worship permitted by the latter statute.

Conspiracies or riots.

The facts attending disturbances of religious assemblies may sometimes authorize proceedings at common law for a

(*x*) 52 Geo. III. c. 155. s. 12.
(*y*) *Id.* s. 14.
(*z*) Rex *v.* Hube, *ante*, 405.
(*a*) Rex *v.* Wadley, 4 M. and S. 508.
(*b*) *Ante*, 404.

conspiracy or a riot: (*c*) and we have seen that by the enactment of a statute of George I. if persons riotously assembled begin to demolish or pull down any church, chapel, or building for religious worship, certified and registered according to the 1 W. and M. sess. 1. c. 18. they will be guilty of felony without benefit of clergy. (*d*)

(*c*) See Preced. 2 Chit. Crim. L. 29. (*d*) *Ante*, 356.

CHAPTER THE THIRTIETH.

Of Forcible Entry and Detainer.

Offence at common law.

A *FORCIBLE entry* or *detainer* is committed by violently taking or keeping possession of lands and tenements with menaces, force, and arms, and without the authority of the law. (*a*) It has been laid down in the books that, at common law, and before the passing of the statutes relating to this subject, if a man had a right of entry upon lands or tenements, he was permitted to enter with force and arms; and to detain his possession by force, where his entry was lawful: (*b*) and that even at this day he who is wrongfully dispossessed of his *goods*, may justify the re-taking of them by force from the wrong doer, if he refuse to re-deliver them. (*c*) However, it is clear that, in many cases, an indictment will lie at common law for a forcible entry, if it contain, not merely the common technical words, "with force and arms," but also such a statement as shews that the facts charged amount to more than a bare trespass, for which no one can be indicted. (*d*) And, in a modern case in the court of King's Bench, it was mentioned, by the great judge who then presided in that court, as a part of the law which ought to be preserved, that no one shall with force and violence assert his own title. (*e*) But on a subsequent day of the

(*a*) 4 Blac. Com. 148.

(*b*) Dalt. Just. 297. Lamb. 135. Crom. 70. a, b. 1 Hawk. P. C. c. 64. s. 1, 2, 3. 3 Bac. Abr. *Forcible Entry and Detainer.*

(*c*) 1 Hawk. P. C. c. 64. s. 1.

(*d*) Rex *v.* Bake and others, 3 Burr. 1731. Rex *v.* Bathurst, Say. 225. referred to in Rex *v.* Storr, 3 Burr. 1699, 1702. Rex *v.* Wilson and others, 8 T. R. 357. in which last case the indictment charged the defendants (twelve in number) with having *unlawfully and with a strong hand* entered, &c. and it was held good.

(*e*) By Lord Kenyon, C. J. Rex *v.* Wilson and others, 8 T. R. 361.

same term he said that the court wished that the grounds of their opinion in that case might be understood, and desired that it might not be considered as a precedent in other cases to which it did not apply. He then proceeded: "Perhaps "some doubt may hereafter arise respecting what Mr. Ser- "jeant Hawkins says, that at common law the party may "enter with force into that to which he has a legal title. "But without giving any opinion concerning that dictum "one way or the other, but leaving it to be proved or dis- "proved whenever that question shall arise, all that we "wish to say is, that our opinion in this case leaves that "question untouched; it appearing by this indictment that "the defendants unlawfully entered, and therefore the court "cannot intend that they had any title." (*f*)

Offence by statutes.

Whatever may be the true doctrine upon this subject at common law, the statutes which have been passed respecting forcible entries and detainers are clearly intended to restrain all persons from having recourse to violent methods of doing themselves justice: and it is the more usual and effectual method to proceed upon these statutes, which give restitution and damages to the party grieved.

Statutes, 5 R. II. c. 8. None shall enter into lands, &c. with strong hand.

By the 5 R. II. c. 8. none shall make entry into any lands and tenements but in cases where entry is given by the law; and in such cases not with strong hand, nor with multitude of people, but only in a peaceable and easy manner, on pain of imprisonment and ransom. This statute gave no speedy remedy, leaving the party injured to the common course of proceeding by indictment or action; and made no provision at all against forcible detainers. The 15 R. II. c. 2. goes further, and enacts, that on complaint of forcible entry into lands and tenements, or other possessions whatsoever, to the justices of peace or any of them, the justices or justice take sufficient power of the county, and go to the place where the force is made; and if they find any that hold such place

15 R. II. c. 8. On complaint of forcible entry justices may commit the offender until fine and ransom.

(*f*) 8 T. R. 364.

forcibly, after such entry, they shall commit them to the next gaol, there to abide, convict by the record of the same justices or justice, until they make fine and ransom: and that the people of the county and the sheriff shall assist, &c. on pain of imprisonment and fine. And it also enacts, that it shall be done in the same manner of them that make such forcible entries in benefices or offices of holy church. But this statute gave no remedy against those who were guilty of a forcible detainer after a peaceable entry, nor against those who were guilty of both a forcible entry and forcible detainer, if they were removed before the coming of a justice of peace; and it gave no power to the justice to restore the party injured to his possession, and did not impose any penalty on the sheriff for disobeying the precepts of the justices in the execution of the statute. Further enactments were therefore necessary. (*g*)

8 H. VI. c. 9. Justices may enquire as well of those that make forcible entries as of those that hold lands, &c. with force.

The statute 8 H. VI. c. 9. enacts, that though the persons making forcible entries be present or else departed before the coming of the justices or justice, the same justices or justice, in some good town next to the tenements so entered, or in some other convenient place, according to their discretion, shall have authority to enquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements as of them which hold the same with force; and if it be found that any doth contrary to this statute, then the justices or justice shall cause to re-seise the lands and tenements, and shall put the party in full possession as before. (*h*) And after making provision concerning the precepts of the justices to the sheriff to return a jury to enquire of forcible entries, the qualification of the jurors, and the remedy by action against those who obtain forcible possession of lands, &c. it enacts, that mayors, &c. of cities,

(*g*) Upon the imposing and levying the fine under this statute of R. II. see 1 Hawk. P. C. c. 64. s. 8. and the cases collected in 3 Bac. Abr. *Forcible Entry and Detainer*, (A) in the notes.

(*h*) S. 3.

towns, and boroughs, having franchise, shall have in such cities, &c. like power to remove such entries, and in other articles aforesaid, rising within the same, as the justices of peace and sheriffs in counties. (*i*) And it is then provided, "that they which keep their possessions with force in any "lands or tenements, whereof they or their ancestors, or "they whose estates they have in such lands and tenements, "have continued their possessions in the same by three "years or more, be not endamaged by force of this sta- "tute." (*k*)

This statute does not extend to those who maintain possession after peaceable enjoyment for three years.

This proviso is further enforced by a statute, 31 Eliz. c. 11. which enacts, "That no restitution, upon any indictment "of forcible entry, or holding with force, be made to any "person or persons, if the person or persons so indicted "hath had the occupation, or hath been in quiet possession "by the space of three whole years together next before "the day of such indictment so found; and his, her, or their "estate or estates therein not ended or determined; which "the party indicted shall and may alledge for stay of resti- "tution, and restitution to stay until that be tried, if the "other will deny or traverse the same: and if the same "allegation be tried against the same person or persons so "indicted, then the same person or persons so indicted to "pay such costs and damages to the other party as shall be "assessed by the judges or justices before whom the same "shall be tried; the same costs and damages to be recovered "and levied as is usual for costs and damages contained in "judgments upon other actions."

31 Eliz. c. 11. No restitution to be made if the party indicted hath been three years in quiet possession and his estate not ended.

Costs.

In the construction of these statutes it has been holden, that if a lessee for years or a copyholder be ousted, and the lessor or lord disseised, and such ouster, as well as disseisin, be found in an indictment of forcible entry, the court may, in their discretion, award a restitution of the possession to such lessee or copyholder; which was, by necessary conse-

Doubt upon the statutes whether lessee for years or copyholder ousted by the lessor or lord could have restitution.

(*i*) S. 6. (*k*) S. 7.

quence, a re-seisin of the freehold also, whether the lessor or lord had desired or opposed it. But it was a great question, whether a lessee for years or a copyholder, being ousted by the lessor or lord, could have a restitution of their possession within the equity of 8 H. VI. the words of which are, that the justice "shall cause to re-seise the lands," &c. and by which it seems to be implied that the party must be ousted of such an estate whereof he may be said to be seised, which must at least be a freehold. For the purpose of removing this doubt, it was enacted by 21 Jac. I. c. 15. that such judges or justices of the peace as by reason of any act of parliament then in force were authorized to give restitution to tenants of any estate of freehold of their lands, &c. entered upon by force, or withholden by force, shall have the like authority (upon indictment of such forcible entries or forcible withholdings) to give like restitution of possession to tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by elegit, statute merchant and staple. It has been holden, that a tenant by the verge is not within this statute; but the propriety of this decision is doubted; as such person, having no other evidence of his title but by the copy of court roll, seems at least to be within the meaning, if not within the words, of the statute. (*l*)

Removed by 21 Jac. I. c. 15.

If a lessor eject his lessee for years, and afterwards be forcibly put out of possession again by such lessee, he has no remedy for a restitution by force of any of the abovementioned statutes: there seems, however, to be no doubt but that a justice of peace, &c. may remove the force, and commit the offender. (*m*)

The law upon these statutes respecting forcible entries and detainers may be further considered with reference I. to the persons who may commit the offence; II. to the nature of the possessions in respect of which it may be com-

(*l*) 1 Hawk. P. C. c. 64. s. 17. (*m*) *Id. Ibid*, s. 17, 18.

mitted; III. to the acts which will amount to a forcible entry; and, IV. to the acts which amount to a forcible detainer.

As to the persons who may commit the offence.

I. A man who breaks open the doors of his own dwelling house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, cannot be guilty of a forcible entry or detainer within these statutes. (*n*) But a joint-tenant or tenant in common may offend against them either by forcibly ejecting or forcibly holding out his companion; for though the entry of such a tenant be lawful *per my et per tout*, so that he cannot in any case be punished in an action of trespass at common law, yet the lawfulness of his entry does not excuse the violence, or lessen the injury done to his companion; and, consequently, an indictment of forcible entry into a moiety of a manor, &c. is good. (*o*) Also where a man has been in possession of land for a great length of time by a defeasible title, and a claim is made by him who has a right of entry, the wrongful possessor, continuing his occupation, will be punishable for a forcible entry and detainer; because all his estate was defeated by the claim, and his continuance in possession afterwards amounts in the judgment of law to a new entry. (*p*)

As to the possessions in respect of which the offence may be committed.

II. A person may be guilty of this offence by a force done to ecclesiastical possessions, as churches, vicarage-houses, &c. as much as if it were done to a temporal inheritance. And it has been holden, as a general rule, that a person may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute as for tithes, &c. It is, however, questioned whether there be any good au-

(*n*) 3 Bac. Abr. *Forcible Entry*, &c. (D) 1 Hawk. P. C. c. 64. s. 32. where it is said also that a man will not be within the statutes who forcibly enters into land in the possession of his own lessee at will; but a *qu.* is subjoined.

(*o*) 1 Hawk. P. C. c. 64. s. 33.

(*p*) *Id.* s. 22. 34. Crom. 69. Dalt. c. 77. Co. Lit. 256.

thority that such an indictment will lie for a common or office; though it seems agreed that an indictment of forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of these possessions; as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt, if he dare put in his beasts into the common, &c. No one can come within the danger of these statutes by a violence offered to another in respect of a way, or such like easement which is no possession. But it seems that a man cannot be convicted, upon view, by force of the 15 R. II. c. 2. of a forcible detainer of any incorporeal inheritance wherein he cannot be said to have made a precedent forcible entry. (*q*)

As to the acts which will amount to a forcible entry.

III. A *forcible entry* must regularly be with a strong hand, with unusual weapons, or with menace of life or limb: it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass is not within these statutes. (*r*) An entry may be forcible not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house, and perhaps also by any act of outrage after the entry, as by carrying away the party's goods, &c. which being found in an assize of *novel disseisin* will make the defendant a disseisor with force, and subject him to fine and imprisonment. (*s*) If a man enters to distrain for rent in arrear with force, this is a forcible entry, because, though he does not claim the land itself, yet he claims a right and title out of it, which by these sta-

(*q*) 1 Hawk. P. C. c. 64. s. 31. Bac. Abr. *Forcible Entry*, &c. (C)

(*r*) 3 Bac. Abr. *Forcible Entry*, &c. (D) Dalt. 300. 1 Hawk. P. C. c. 64. s. 25.

(*s*) 1 Hawk. P. C. c. 64. s. 26.

tutes he is forbid to exert by force; but if a man who has a rent be resisted from his distress with force, this is a forcible disseisin of the rent, for which he may recover treble damages in an assise, or may fine and imprison the party: but he cannot have a writ of restitution; for the statute does not give the justices power to re-seise the rent, but only the lands and tenements themselves. (*t*) If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry. (*u*) And there may be a forcible entry where any person's wife, children, or servants, are upon the lands to preserve the possession; because whatever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession, because they are not capable of being substituted as agents; and therefore their being upon the land continues no possession. (*w*)

Forcible entry from circumstances of terror.

Whenever a man, either by his behaviour or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim, or beat, those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance. (*x*) And though a man enter peaceably, yet if he turn the party out of possession by force,

(*t*) 3 Bac. Abr. *Forcible Entry*, &c. (B)

(*u*) 1 Hawk. P. C. c. 64. s. 26. where it is given as the author's opinion; and contrary opinions are noticed proceeding on the ground that no violence was done to the house, but only to the person of the party.

(*w*) 3 Bac. Abr. *Forcible Entry*, &c. (B)

(*x*) 1 Hawk. P. C. c. 64. s. 27.

or frighten him out of possession by threats, it is a forcible entry. (*y*) But threatening to spoil the party's goods, or destroy his cattle, or to do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. (*z*)

Circumstances which do not amount to a forcible entry.

If a person who pretends a title to lands, merely go over them, either with or without a great number of attendants, armed or unarmed, in his way to the church, or market, or for a like purpose, without doing any act which either expressly or impliedly amounts to a claim of the lands, he cannot be considered as making an entry within the meaning of the statutes: otherwise, if he make an actual claim with any circumstances of force or terror. (*a*) Drawing a latch and entering a house seems not to be a forcible entry according to the better opinion: (*b*) so if a man open the door with a key, or enter by an open window, or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries. (*c*)

A single person may commit a forcible entry as well as a number. (*d*) But all who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not. (*e*) So if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one only use force, it is a forcible entry in them all, because they come in company to do an unlawful act: but it is otherwise where one had a right of entry, for there they

(*y*) Dalt. 299. 3 Bac. Abr. *Forcible Entry, &c.* (B)

(*z*) 1 Inst. 257. Bro. tit. *Duress*, 12. 16. 1 Hawk. P. C. c. 64. s. 28.

(*a*) 1 Hawk. P. C. c. 64. s. 20, 21.

(*b*) There have been different opinions upon this point, Noy, 136, 137. 3 Bac. Abr. *Forcible Entry, &c.* (B) 1 Hawk. P. C. c. 64. s. 26.

(*c*) 4 Com. Dig. *Forcible Entry, &c.* (A 3.)

(*d*) *Id.* (A 2.) 1 Hawk. P. C. c. 64. s. 29.

(*e*) 1 Hawk. P. C. c. 64. s. 22.

only come to do a lawful act, and therefore it is the force of him only who used it. (*f*) And he who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he did not concur in or promote the force. (*g*)

As to the acts which will amount to a forcible detainer.

IV. *Forcible detainer* is where a man, who enters peaceably, afterwards detains his possession by force: and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter: and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault any one who shall attempt to make an entry into it; and that he is in like manner guilty who shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in. (*h*) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined: and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is forfeited, or to the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence. (*i*)

Circumstances which do not amount to a forcible detainer.

But a man will not be guilty of the offence of forcible detainer for merely refusing to go out of a house, and continuing therein in despite of another. (*k*) So that it is not a

(*f*) 3 Bac. Abr. *Forcible Entry*, &c. (B)

(*g*) 1 Hawk. P. C. c. 64. s. 24.

(*h*) 1 Hawk. P. C. c. 64. s. 30.

(*i*) 4 Com. Dig. *Forcible Detainer* (B 1.)

(*k*) 1 Hawk. P. C. c. 64. s. 30.

forcible detainer if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it; or shuts the door against the lessor when he would enter; or if he keeps out a commoner, by force, upon his own land. (*l*) And it has been seen that the statute 8 Hen. VI. c. 9. does not apply to a person who has been in possession for three years by himself, or any other under whom he claims. (*m*) But a person in quiet possession for three years, and then disseised by force, and restored, cannot afterwards detain with force within three years after his restitution; for his possession was interrupted. (*n*)

Remedies.

The remedies against such as are guilty of forcible entries or detainers are either by action, by complaint to justices of peace, (who may proceed upon view or inquisition), or by indictment at the general sessions. (*o*) And if a forcible entry or detainer be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force. (*p*) Some of the points which have been determined with respect to an indictment for these offences, and also concerning the award of restitution, may be shortly noticed. (*q*)

Of the indictment. Statement of force and violence.

The statutes seem to require that the entry should be laid in the indictment *manu forti*, or *cum multitudine gentium*: but some have holden that equivalent words will be sufficient, especially if the indictment concludes *contra for-*

(*l*) 4 Com. Dig. *Forcible Detainer* (B 2.)

(*m*) *Ante*, 411. And by 31 Eliz. c. 11. (*ante*, 411) no restitution is to be given on an indictment of forcible entry or detainer, where the party has been three years in quiet possession before the indictment found, and his estate not determined.

(*n*) 4 Com. Dig. *Forcible Detainer* (B 2.)

(*o*) See the statutes, *ante*, 409 to 411. 4 Com. Dig. *Forcible Entry* (C). 4 Blac. Com. 148. 2 Burn. Just. *Forcible Entry*, &c. III. IV. V.

(*p*) 2 Burn. Just. *Forcible Entry and Detainer* VII. *Ante*, 353.

(*q*) As to the proceedings by justices of peace, see 2 Burn Just: *Forcible Entry*, &c. V. 2 Com. Dig. *Forcible Entry* (D).

mam statuti: but it is not sufficient to say only that the party entered *vi et armis*, since that is the common allegation in every trespass. (*r*) No particular technical words are necessary in an indictment at common law; all that is required is, that it should appear by the indictment that such force and violence have been used as constitute a public breach of the peace. (*s*)

Description of the premises.

The tenement in which the force was committed must be described with convenient certainty; for otherwise the defendant will not know the particular charge to which he is to make his defence, nor will the justices or sheriff know how to restore the injured party to his possession. Thus an indictment of forcible entry into a tenement, (*t*) (which may signify any thing whatsoever wherein a man may have an estate of freehold (*u*),) or into a house or tenement, (*w*) or into two closes of meadow or pasture, (*x*) or into a rood or half a rood of land, (*y*) or into certain lands belonging to such a house, (*z*) or into such a house without shewing in what town it lies, (*a*) or into a tenement with the appurtenances called *Truepenny* in D. (*b*) is not good. But an indictment for a forcible entry *in domum mansionalem sive messuagium*, &c. is good, for these are words equipollent. (*c*) And an indictment for an entry into a close called Serjeant Herne's close, without adding the number of acres, is good; for here is as much certainty as is required in ejectment. (*d*) And an indictment may be void as to such part

(*r*) Baude's case, Cro. Jac. 41. Rast. Ent. 354. 3 Bac. Abr. *Forcible Entry*, &c. (E)

(*s*) By Lawrence, J. in Rex *v.* Wilson and others, 8 T. R. 362.

(*t*) Dalt. 15. 2 Roll. R. 46. 2 Rol. Abr. 80. pl. 8. 3 Leon. 102.

(*u*) Co. Lit. 6. a.

(*w*) 2 Roll. Abr. 80. pl. 4, 5. Roll. R. 334. Cro. Jac. 633. Palm. 277.

(*x*) 2 Roll. Abr. 81. pl. 4.

(*y*) Bulst. 201.

(*z*) 2 Leon. 186. 3 Leon. 101. Bro. tit. *Forc. Entry*, 23.

(*a*) 2 Leon. 186.

(*b*) 2 Roll. Abr. 80. pl. 7.

(*c*) Ellis's case, Cro. Jac. 633. Palm. 277.

(*d*) 3 Bac. Abr. *Forcible Entry*, &c. (E) 1 Hawk. P. C. c. 64. s. 31.

of it only as is uncertain, and good for so much as is certain: thus an indictment for a forcible entry into a house and certain acres of land, may be quashed as to the land, and stand good as to the house. (*e*)

Description of the estate of the party expelled.

An indictment on the 8 Hen. VI. c. 9. (*f*) must shew that the place was the freehold of the party grieved at the time of the force. (*g*) And in a case where the court of King's Bench quashed an indictment, because it did not appear what estate the person expelled had in the premises, they said that it was absolutely necessary that this should appear, otherwise it would be uncertain whether any one of the statutes relative to forcible entries extended to the estate from which the expulsion was; the 5 Ric. II. c. 7. the 15 Ric. II. c. 2. and the 8 Hen. VI. c. 9. only extending to freehold estates; and the 21 Jac. I. c. 15. extending only to estates holden by tenants for years, tenants by copy of court-roll, and tenants by elegit, statute merchant, and statute staple. (*h*) And it has been laid down as a general rule that an indictment cannot warrant a restitution, unless it find that the party was seised at the time. (*i*) But in an indictment at common law, where the breach of the public peace is the gist of the offence, and the prosecutor is not entitled to restitution and damages, it appears to be sufficient to state only that the prosecutor was in possession of the premises. (*j*)

Repugnancy; statement of disseisin, &c.

A repugnancy in setting forth the offence in an indictment on these statutes, is an incurable fault: as where it is alleged that the party was possessed of a term of years, or

(*e*) 3 Bac. Abr. *Forcible Entry*, &c. (E). 1 Hawk. P. C. c. 64. s. 31.

(*f*) *Ante*, 410.

(*g*) Rex *v.* Dorny, 1 Lord Raym. 210. 1 Salk. 260. Anon. 1 Vent. 89. 2 Keb. 495. Hetl. 73. Latch, 109.

(*h*) Rex *v.* Wannop, Say, R. 142.

(*i*) 3 Bac. Abr. *Forcible Entry*, &c. (E) where and in 1 Hawk. P. C. c. 64. s. 3. see the cases on this subject collected. And see also Rex *v.* Griffith et al. 3 Salk. 169.

(*j*) Rex *v.* Wilson and others, 8 T. R. 357.

of a copyhold estate, and that the defendants disseised him; or that the defendants disseised J. S. of land then and yet being his freehold, for it implies that he always continued in possession; and if so, it is impossible he could be disseised at all. (*k*) It seems that an indictment on 8 Hen. VI. c. 9. setting forth an entry and forcible detainer is good, without shewing whether the entry was forcible or peaceable: but it must set forth an entry; for otherwise it does not appear but that the party has been always in possession, in which case he may lawfully detain it by force. (*l*) The time and place of the disseisin must be sufficiently set forth in the indictment; but it appears to be sufficient to state that the defendant on such a day entered, &c. and disseised, &c. without adding the words *then and there;* for it is the natural intendment that the entry and disseisin both happened together. (*m*) A disseisin is sufficiently set forth by alleging that the defendant entered, &c. into such a tenement, and disseised the party, without using the words "unlawfully," or "expelled," for they are implied. (*n*) But no indictment can warrant an award of restitution unless it find that the wrong-doer ousted the party grieved, and also continues his possession at the time of the finding of the indictment; for it is a repugnancy to award restitution of possession to one who never was in possession, and it is vain to award it to one who does not appear to have lost it. (*o*)

If a bill, both for a forcible entry and forcible detainer, be preferred to a grand jury, and found "not a true bill" as to the entry with force, and "a true bill" as to the detainer, it will not warrant an award of restitution; but is void, because the grand jury cannot find a bill true for part and false for part, as a petit jury may. (*p*)

(*k*) 1 Hawk. P. C. c. 64. s. 39. 3 Bac. Abr. *Forc. Entr. &c.* (E).

(*l*) 1 Hawk. P. C. c. 64. s. 40. 3 Bac. Abr. *ibid.* And see the statute, *ante*, 411.

(*m*) Baude's case, Cro. Jac. 41. 1 Hawk. *ibid.* s. 42.

(*n*) 3 Bac. Abr. *Forc. Entr. &c.* (E).

(*o*) 1 Hawk. P. C. c. 64. s. 41.

(*p*) 1 Hawk. P. C. c. 64. s. 40. But this it seems does not apply to

Of the award of restitution.

The same justice or justices before whom an indictment of forcible entry or detainer shall be found may award *restitution;* but no other justices, except those before whom the inquest was found, can award restitution, unless the indictment be removed by *certiorari* into the court of King's Bench; and that court, by the plenitude of its power, can restore, because that is supposed to be implied by the statute; on the ground that whenever an inferior jurisdiction is erected, the superior jurisdiction must have authority to put it in execution. So, if an indictment be found before the justices of the peace at their quarter sessions, they have authority to award a writ of restitution, because the statute having given power to the justices or justice to re-seise, it may as well be done by them in court as out of it. (*q*) But the justices of *oyer* and *terminer*, or general gaol delivery, though they may enquire of forcible entries, and fine the parties, yet cannot award a writ of restitution. (*r*)

the case of different counts in the same indictment, but only where the grand jury find "a true bill," and "not a true bill" upon different parts of one and the same charge. See Rex *v.* Fieldhouse, Cowp. 323.

(*q*) 3 Bac. Abr. *Forcible Entry*, &c. (F).

(*r*) *Id. Ibid* and 1 Hawk. P. C. c. 64. s. 51. where it is said that justices of *oyer* and *terminer* have no power either to enquire of a forcible entry or detainer, or to award restitution on an indictment on the statutes; because when a new power is created by statute, and certain justices are assigned to execute it, it cannot regularly be executed by any other: and inasmuch as justices of oyer and terminer have a commission entirely distinct from that of justices o peace, they shall not from the general words of their commission *ad inquirend' de omnibus*, &c. be construed to have any such powers as are specially limited to justices of peace. But in 4 Com. Dig. *Forc. Entr.* (D 5.) it is said that justices of gaol delivery may award restitution upon an indictment before them; and Sav. 68. is cited: and afterwards *Id.* (D 7.) it is said that restitution shall not be by justices of assize, gaol delivery, or justices of peace, *if the indictment was not found before them*: and H. P. C. 140. Dalt. c. 44. 131. are cited; assuming here, as it should seem, that if the indictment were found before justices of assize and gaol delivery, they might award restitution.

Restitution ought only to be awarded for the possession of tenements visible and corporeal; for a man who has a right to such as are invisible and incorporeal, as rents or commons, cannot be put out of possession of them, but only at his own election, by a fiction of law, to enable him to recover damages against the person that disturbs him in the enjoyment of them: and all the remedy that can be desired against a force in respect to such possessions is to have the force removed, and those who are guilty of it punished, which may be done by 15 R. II. c. 2. (*s*) And restitution is to be awarded only to him who is found by the indictment to have been put out of the *actual possession*, and not to one who was only seised in law. (*t*) Upon the removal of the proceedings into the court of King's Bench by certiorari, that court may award a restitution discretionally; and will so award unless the defendant plead very soon, and take notice of trial within the term. (*u*) And where a conviction of a forcible entry was quashed in that court for uncertainty; but the restitution was opposed on an affidavit that the party's title (which was by lease,) was expired since the conviction; the court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction. (*w*)

Of the bar or stay to the award of restitution.

It appears by the proviso in the statute of 8 Hen. VI. c. 9. and also by the 31 Eliz. c. 11. that any one indicted upon these statutes may allege quiet possession for three whole years to stay the award of restitution; in the construction of which it has been holden, that such possession must have continued without interruption during three whole years next before the indictment. (*x*) And it has also been said that the three years' possession must be of a lawful estate; and therefore that a disseisor can in no case justify a forcible entry or detainer against the disseisee

(*s*) 1 Hawk. P. C. c. 64. s. 45. Lamb. Just. 153. Co. Lit. 323.

(*t*) Lamb. Just. 153. Dalt. c. 83.

(*u*) Rex *v.* Marrow, Ca. temp. Hardw. 174.

(*w*) Rex *v.* Jones, 1 Str 474.

(*x*) 3 Bac. Abr. *Forc. Entr. &c.* (G). 1 Hawk. P. C. c. 64. s. 53.

having a right of entry, as it seems that he may against a stranger, or even against the disseisee having, by his laches, lost his right of entry. (*y*) Wherever such possession is pleaded in bar of a restitution either in the King's Bench or before justices of the peace, no restitution ought to be awarded till the truth of the plea be tried: and such plea need not shew under what title, or of what estate, such possession was; because not the title, but the possession only, is material. (*z*) If the defendant tender a traverse of the force (which must be in writing), no restitution ought to be till such traverse be tried; in order to which the justice, before whom the indictment is found, ought to award a *venire* for a jury: but if such jury find so much of the indictment to be true as will warrant a restitution, it will be sufficient, though they find the other part of it to be false. (*a*) Where the defendant pleads three years' possession in stay of restitution, according to 31 Eliz. c. 11. and it is found against him, he must pay costs. (*b*)

Of superseding the restitution.

The same justices who have awarded a restitution on an indictment of forcible entry, &c. or any two or one of them, may afterwards *supersede* such restitution upon an insufficiency in the indictment appearing unto them: but no other justices or court whatsoever have such power, except the court of King's Bench; a *certiorari* from whence wholly closes the hands of the justices of peace, and avoids any restitution which is executed after its *teste*, but does not bring the justices into contempt without notice. (*c*)

Of setting aside the restitution.

The court of King's Bench has such a discretionary power over these matters, from an equitable construction of the statutes, that if a restitution shall appear to have been ille-

(*y*) 3 Bac. Abr. *Forc. Entr. &c.* (G). 1 Hawk. c. 64. s. 54.

(*z*) 1 Hawk. c. 64. s. 56.

(*a*) 3 Bac. Abr. *Forc. Entr. &c.* (G). 1 Hawk. c. 64. s. 58, 59. Reg. *v.* Winter, 2 Salk. 588.

(*b*) Reg. *v.* Goodenough, 2 Lord Raym. 1036. And see the words of the statute, *ante*, 411.

(*c*) 3 Bac. Abr. *Id. Ibid.* 1 Hawk. c. 64. s. 61, 62.

gally awarded or executed, that court may *set it aside*, and grant a re-restitution to the defendant. But a defendant cannot in any case whatsoever *ex rigore juris* demand a restitution, either upon the quashing of the indictment, or a verdict found for him on a traverse thereof, &c. for the power of granting a restitution is vested in the King's Bench only by an equitable construction of the general words of the statutes, and is not expressly given by those statutes, and is never made use of by that court but when, upon consideration of the whole circumstances of the case, the defendant shall appear to have some right to the tenements, the possession whereof he lost by the restitution granted to the prosecutor. (*d*)

The court of King's Bench has been so favorable to one who, upon his traverse of an indictment upon these statutes being found for him, has appeared to have been unjustly put out of his possession, that they have awarded him a restitution, notwithstanding it has been shewn to the court that, since the restitution granted upon the indictment, a stranger has recovered the possession of the same land in the lord's court. (*e*)

How restitution shall be made.

The justices or justice may execute the writ of restitution in person, or may make their precept to the sheriff to do it. (*f*) The sheriff, if need be, may raise the power of the county to assist him in the execution of the precept; and therefore, if he make a return thereto that he could not make a restitution by reason of resistance, he shall be amerced. (*g*) And it is said, that a justice of peace or sheriff may break open a house to make restitution. (*h*)

If possession under a writ of restitution is avoided imme-

(*d*) 3 Bac. Abr. *Id. Ibid.* 1 Hawk. c. 64. s. 63, 64, 65.

(*e*) 3 Bac. Abr. *Id. Ibid.* 1 Hawk. c. 64. s. 66.

(*f*) 1 Hawk. c. 64. s. 49.

(*g*) *Id.* s. 52.

(*h*) 4 Com. Dig. *Forcible Entry* (D. 6).

diately after execution by a fresh force, the party shall have a second writ of restitution without a new inquisition: but the second writ must be applied for within a reasonable time. (*i*) And where restitution is not ordered till three years after the inquisition, it is bad. (*k*)

(*i*) Rex *v.* Harris, 1 Lord Raym. 482. (*k*) Rex *v.* Harris, 3 Salk. 313.

CHAPTER THE THIRTY-FIRST.

Of Nuisances.

NUISANCE, *nocumentum*, or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds; *public* or *common* nuisances, which affect the public, and are an annoyance to *all* the king's subjects; and *private* nuisances, which may be defined as any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another. (*a*) Private nuisances, as they are remedied only by civil proceedings, do not come within the scope of this treatise: but public or common nuisances, as they annoy the whole community in general, and not merely some particular person, are properly punishable by indictment, and not the subject of action: for it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects. (*b*) In treating of public or common nuisances, we

Nuisances are public and private.

(*a*) 3 Blac. Com. 216. 2 Inst. 406.

(*b*) 4 Blac. Com. 166. There is, however, a case mentioned in the books where a party has been admitted to have a private satisfaction by civil suit for that which is a public nuisance; namely, where he has sustained some extraordinary damage by it beyond the rest of the king's subjects. As if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, not common to others, it has been held that the party may have his action. Co. Lit 56. 5 Rep. 73. 3 Blac. Com. 219. And see also Fowler *v.* Sanders, Cro. Jac. 446. But the particular damage in this case must be direct, and not consequential, as by being delayed in a journey of importance. Bull. N. P. 26. In Rex *v.* Dewsnap and another 16 East. 196. Lord Ellenborough, C. J. said, "I did not

may consider, I, of public nuisances in general; II, of nuisances to public highways; III, of nuisances to public rivers; and, IV, of nuisances to public bridges.

SECT. I.

OF PUBLIC NUISANCES IN GENERAL.

Of public nuisances in general.

PUBLIC nuisances may be considered as offences against the public order and œconomical regimen of the state; being either the doing of a thing to the annoyance of all the king's subjects, or the neglecting to do a thing which the common good requires. (*c*) But the annoyance or neglect must be of a real and substantial nature: and the fears of mankind, though they may be reasonable, will not create a nuisance. (*d*)

Offensive trades and manufactures.

Offensive *trades* and *manufactures* may be public nuisances. A *brewhouse*, erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighbourhood, may be indicted as a common nuisance; and so in the like case may a *glasshouse*, or *swineyard*. With respect to a *candle manufactory*, it has been holden, that it is no common nuisance to make candles in a town, because the needfulness of them shall dispense with the noisomeness of the smell: but the reasonableness of this opinion seems justly to be questionable, because, whatever necessity there may be that candles be made, it

"expect that it would have been "disputed at this day that though "a nuisance may be public, yet "that there may be a special griev- "ance, arising out of the common "cause of injury, which presses "more upon particular individuals "than upon others not so imme- "diately within the influence of it. "In the case of stopping a com- "mon highway which may affect "all the subjects, yet if a particu- "lar person sustain a special in- "jury from it, he has an action."

(*c*) 4 Blac. Com. 166. 1 Hawk. P. C. c. 75. s. 1. 2 Roll. Abr. 83.

(*d*) By Lord Hardwicke, Anon. 3 Atk. 750.

cannot be pretended that it is necessary to make them in a town. (*e*)

The existence of the nuisance depends upon the number of houses and concourse of people; and also upon its making the enjoyment of life and property uncomfortable.

An indictment will not lie for that which is a nuisance only to a few inhabitants of a particular place: as where, upon an indictment against a tinman for the noise made by him in carrying on his trade, it appeared in evidence that the noise only affected the inhabitants of three numbers of the chambers in *Clifford's Inn*, and that by shutting the windows the noise was in a great measure prevented, it was ruled by Lord Ellenborough, C. J. that the indictment could not be sustained, as the annoyance was, if any thing, a private nuisance. (*f*) But an indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling houses, has been held sufficient: and the court said, that if a man erects a nuisance *near* the highway, by which the air thereabouts is corrupted, it must in its nature be a nuisance to those who are in the highway; and that therefore the indictment was well enough. (*g*) And an indictment was held good for a nuisance in erecting buildings, and making fires which sent forth noisome, offensive, and stinking smokes, and making great quantities of noisome, offensive, and stinking liquors, near to the king's common highway, and near to the dwelling-houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells. (*h*) Upon the report of the evidence it appeared that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave

(*e*) 1 Hawk. P. C. c. 75. s. 10. In 5 Bac. Abr. *Nuisance*, (A) it is said, "It seems the better opinion "that a brewhouse, glasshouse, "chandler's shop, and sty for "swine, set up in such inconve- "nient parts of a town that they "cannot but greatly incommode "the neighbourhood, are common "nuisances:" and 2 Roll. Abr. 139. Cro. Car. 510. Hut. 136. Palm. 536. Vent. 26. Keb. 500. 2 Salk. 458. pl. 3. 460. pl. 7. 2 Lord Raym. 1163. are cited.

(*f*) Rex *v.* Lloyd, 4 Esp. 200.

(*g*) Rex *v.* Pappineau, 1 Str. 686.

(*h*) Rex *v.* White and Ward, 1 Burr. 333.

them head-achs; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable: and further, that the existence of the nuisance depended upon the number of the houses and concourse of people, and was a matter of fact to be judged of by the jury. (*i*) But the carrying on of an offensive trade is not indictable unless it be destructive of the health of the neighbourhood, or render the houses untenantable or uncomfortable. (*k*)

How far a noxious trade may be sanctioned.

It appears to have been ruled that a person cannot be indicted for setting up a noxious manufactory in a neighbourhood in which other offensive trades have long been borne with, unless the inconvenience to the public be greatly increased. (*l*) And also that a person cannot be indicted for continuing a noxious trade which has been carried on at the same place for nearly fifty years. (*m*) But this seems hardly to be reconcileable to the doctrine, subsequently recognized, that no length of time can legalize a public nuisance, although it may supply an answer to the action of a private individual. (*n*)

Gunpowder and combustibles.

It seems, that erecting *gunpowder* mills, or keeping *gunpowder* magazines near a town, is a nuisance by the common law, for which an indictment or information will lie. (*o*) And

(*i*) Rex *v.* White and Ward, 1 Burr. 337. where see also that the word "noxious" not only means hurtful and offensive to the smell, but includes the complex idea of insalubrity and offensiveness.

(*k*) Rex *v.* Davey and another, 5 Esp. 217.

(*l*) Rex *v.* Bartholomew Neville, Peake 91.

(*m*) Rex *v.* Samuel Neville, Peake 93.

(*n*) Weld *v.* Hornby, 7 East. 199. Rex *v.* Cross, 3 Campb. 227. and see *post*, 415.

(*o*) Rex *v.* Williams, E. 12. W. an indictment against Roger Williams for keeping 100 barrels of gunpowder near the town of Bradford, and he was convicted. And in Rex *v.* Taylor, 15 Geo. II. the court granted an information against the defendant as for a nuisance, on affidavits of his keeping great quantities of gunpowder near *Maldon* in *Surry*, to the endangering of the

the making, keeping, or carrying, of too large a quantity of *gunpowder* at one time, or in one place or vehicle, is prohibited by the statute 12 Geo. III. c. 61. under heavy penalties and forfeiture. And it appears, that persons putting on board a ship an article of a combustible and dangerous nature, without giving due notice of its contents, so as to enable the master to use proper precautions in the stowing of it, will be guilty of a misdemeanor. The case did not come before the court of King's Bench directly upon its criminal nature; but that court, in adverting to the conduct imputed to the defendants, declared it to be criminal, and said, "in "order to make the putting on board *wrongful* the defend- "ants must be consusant of the dangerous quality of the "article put on board; and if, being so, they yet gave no "notice, considering the probable danger thereby occa- "sioned to the lives of those on board, it amounts to a spe- "cies of delinquency in the persons concerned in so putting "such dangerous article on board, for which they are crimi- "nally liable, and punishable as for a misdemeanor at "least." (*p*)

All *disorderly inns* or *ale-houses*, *bawdy-houses*, *gaming-houses*, *play-houses*, unlicensed or improperly conducted, booths and stages for *rope-dancers*, *mountebanks*, and the like, are public nuisances, and may therefore be indicted. (*q*)

Disorderly inns.

It seems to be agreed, that the keeper of an *inn* may, by the common law, be indicted and fined as being guilty of a public nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or take exorbitant prices, or set up a new inn in a place where there is no manner of need of one, to the hin-

church and houses where he lived. 2 Str. 1167. 2 Burn. Just. *Gunpowder*; where it is said, "or ra- "ther it should have been ex- "pressed to the endangering of "the lives of his majesty's sub- "jects."

(*p*) Williams *v.* The East India Company, 3 East. 192. 201.

(*q*) 4 Blac. Com. 167.

drance of other ancient and well governed inns, or keep it in a place in respect of its situation wholly unfit for such a purpose. (*r*) And it seems also to be clear that if one who keeps a common inn refuse either to receive a traveller as a guest into his house, or to find him victuals or lodging, upon his tendering him a reasonable price for the same, he is not only liable to render damages to the party in an action, but may also be indicted and fined at the suit of the king; and it is also said, that he may be compelled by the constable of the town to receive and entertain such a person as his guest; and that it is in no way material whether he have any sign before his door or not, if he make it his common business to entertain passengers. (*s*)

The keeping of an inn is no franchise, but a lawful trade when not exercised to the prejudice of the public, and therefore there is no need of any licence or allowance for such erection. (*t*) But if an inn use the trade of an alehouse, as almost all innkeepers do, it will be within the statutes made concerning alehouses. (*u*)

Bawdy-houses.

It is clearly agreed that keeping a *bawdy-house* is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness. (*w*) And it has been

(*r*) 1 Hawk. P. C. c. 78. s. 1. And see in 3 Bac. Abr. *Inns*, &c. (A) that as inns from their number and situation may become nuisances, they may be suppressed, and the parties keeping them may at common law be indicted and fined. And see also as to exorbitant prices, *Id.* (C) 2. 21 Jac. I. c. 21.

(*s*) 1 Hawk. P. C. c. 78. s. 2.

(*t*) Dalt. c. 56. Blackerby 170. 1 Burn. Just. tit. *Alehouses*, I. 3 Bac. Abr. *Inns*, &c. (A)

(*u*) 1 Burn. Just. *Alehouses*, where those statutes are collected. Before the stat. 5 and 6 Edw. VI. c. 25. it was lawful for any one to keep an *alehouse* without licence, for it was a means of livelihood which any one was free to follow. But if it was so kept as to be disorderly, it was indictable as a nuisance. 1 Salk. 45. 1 Hawk. P. C. c. 78. s. 52. *in marg.*

(*w*) 3 Inst. c. 98. p. 204. 1 Hawk. P. C. c. 74. and c. 75. s. 6. 3 Bac.

adjudged that this is an offence of which a feme covert may be guilty as well as if she were sole, and that she, together with her husband, may be convicted of it; for the keeping the house does not necessarily import property, but may signify that share of government which the wife has in a family as well as the husband; and in this she is presumed to have a considerable part, as those matters are usually managed by the intrigues of her sex. (*x*) If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be a keeping of a bawdy-house as much as if she had a whole house. (*y*) But an indictment cannot be maintained against a person for being a common bawd, and procuring men and women to meet together to commit fornication: the indictment should be for keeping a bawdy-house. (*z*) For the bare solicitation of chastity is not indictable, but cognizable only in the ecclesiastical courts. (*a*)

Common gaming-houses.

It is clearly agreed, that all common *gaming-houses* are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness, and avaricious ways of gaining property, great numbers whose time might otherwise be employed for the good of the community. (*b*) And it has also been adjudged, that it is an offence for which a feme covert may be indicted; for, as she may be concerned in acts of bawdry, as has been observed above, so she may be active in promoting gaming, and furnishing the guests with conveniencies for that purpose. (*c*) There are also certain penal-

Abr. *Nuisances* (A). 3 Burn. Just. *Lewdness* and *Nuisance*.

(*x*) Reg. *v.* Williams, 1 Salk. 383. *ante*, 25.

(*y*) Rex *v.* Pierson, 2 Lord Raym. 1197. 1 Salk. 382.

(*z*) *Id. Ibid.*

(*a*) 1 Hawk. P. C. c. 74. 3 Burn. Just. *Lewdness*.

(*b*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 6.

(*c*) Rex *v.* Dixon, Trin. 2 Geo. I. 5 Bac. Abr. *Nuisances* (A). 10 Mod. 335. 1 Hawk. P. C. c. 92. s. 30. and see *ante*, 25.

ties imposed by statutes upon the offence of keeping a common gaming-house. (*d*)

An indictment against a defendant for that he did keep a common, ill-governed, and disorderly house, and in the said house for his lucre, &c. certain persons of ill name, &c. to frequent and come together, did cause and procure, and the said persons in the said house to remain *fighting of cocks*, *boxing*, *playing at cudgels*, and *misbehaving themselves*, did permit, has been held to be good. (*e*) And it seems that the keeping of a *cockpit* is not only an indictable offence at common law, but that a cockpit is considered as a gaming-house within the statute 33 Hen. VIII. c. 9. s. 11. which imposes a penalty of forty shillings per day upon such houses; and therefore, on a conviction on an indictment at common law, the court will measure the fine by inflicting forty shillings for each day, according to the number of days such cockpit was kept open. (*f*)

Playhouses.

It seems to be the better opinion that playhouses, having been originally instituted with a laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may only become such by accident; as, where they draw together such numbers of coaches or people, &c. as prove generally inconvenient to the places adjacent; or, when they pervert their original institution by recommending vicious and loose characters, under beautiful colours, to the imitation of the people, and make a jest of things commendable, serious, and useful. (*g*) Players and playhouses are now put under salutary regulations by the provisions of

(*d*) 1 Hawk. P. C. c. 92. s. 14. *et sequ.*

(*e*) Rex *v.* Higginson, 2 Burr. 1233.

(*f*) Rex *v.* Howell, 3 Keb. 510. 1 Hawk. P. C. c. 92. s. 29.

(*g*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 7. And as to the performance of an obscene play see *ante*, 317.

several statutes. (*h*) And places of public entertainment in the neighbourhood of London, if not properly licensed, are to be deemed *disorderly houses* by the statute 25 Geo. II. c. 36.(*i*) which, reciting the multitude of places of entertainment for the lower sort of people as a great cause of thefts and robberies, enacts, "that any house, room, garden, or "other place, kept for public dancing, music, or other pub- "lic entertainment of the like kind in the cities of *London* "and *Westminster*, or within twenty miles thereof," without a license from the last preceding Michaelmas quarter sessions, under the hands and seals of four of the justices, "shall be deemed a disorderly house or place." The act then particularizes the mode of granting the license, makes it lawful for a constable or other person, authorized by warrant of a justice, to enter such house or place, and to seize every person found therein; and makes every person keeping such house, &c. without a licence liable to a penalty of 100*l.* and otherwise punishable as the law directs in cases of disorderly houses. (*k*)

Places of public entertainment unlicensed to be deemed disorderly houses.

It seems also to be the better opinion, that all *common stages for rope-dancers, &c.* are nuisances, not only because they are great temptations to idleness, but also because they are

Stages for rope-dancers, &c.

(*h*) The 10 Geo. II. c. 28. enacts that persons performing any entertainment of the stage without authority or licence, shall be deemed rogues and vagabonds, and liable to the penalties of 12 Ann. stat. 2. c. 23. (an act repealed, but re-enacted by 17 Geo. II. c. 5.) and also to a penalty of 50*l.* See also the 28 Geo. III. c. 30. by which justices of the peace at their quarter sessions may license theatrical representations occasionally, under certain restrictions. The words "entertainment of the stage," in 10 Geo. II. c. 28. have been held not to extend to an exhibition of *tumbling*. Rex *v.* Handy, 6 T. R. 286. By special acts of parliament playhouses are permitted to be erected in particular places.

(*i*) Made perpetual by the 28 Geo. II. c. 19.

(*k*) By s. 3. this act is not to extend to the theatres in *Drury Lane* and *Covent Garden*, or the *King's Theatre* in the *Haymarket*, nor to performances and public entertainments carried on under letters patent, or licence of the crown, or licence of the lord chamberlain.

apt to draw together numbers of disorderly persons, which cannot but be very inconvenient to the neighbourhood. (*l*)

Proceedings in prosecutions against persons for keeping bawdy-houses, gaming-houses, or other disorderly houses. 25 Geo. II. c. 36.

The proceedings in respect of prosecutions against persons keeping bawdy-houses, gaming-houses, or other disorderly houses, are facilitated by 25 Geo. II. c. 36. by which it is enacted, that if two inhabitants of any parish or place, paying scot and lot, give notice in writing, to the constable, of any person keeping a bawdy-house, gaming-house, or any other disorderly house, in such parish or place, the constable shall go with such inhabitants to a justice; and shall, upon such inhabitants making oath before the justice that they believe the contents of the notice to be true, and entering into a recognizance in twenty pounds each to give material evidence against the person for such offence, enter into a recognizance in the sum of thirty pounds to prosecute with effect at the next sessions or assizes as to the justice shall seem meet. And provision is also made for the payment by the overseers of the charges of prosecution to the constable, and ten pounds on conviction to each of the two inhabitants. (*m*) The person keeping such bawdy-house, &c. is also to be bound over to appear at the sessions or assizes.

Persons *acting* as keepers of disorderly houses to be deemed keepers.

The eighth section of this statute, reciting that by reason of the many subtle and crafty contrivances of persons keeping bawdy-houses, &c. it is difficult to prove who is the real owner or keeper, enacts, that any person "who shall appear, "act, or behave as master or mistress, or as the person having the care, government, or management, of any bawdy-"house, gaming-house, or other disorderly house, shall be "deemed and taken to be the keeper thereof, and shall be "liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or "keeper thereof." By the ninth section any person may

Witness.

(*l*) 5 Bac. Abr. *Nuisances* (A). 1 Hawk. P. C. c. 75. s. 6. And see *ante*, p. 352. note (*g*), as to stage-players being indicted for a riot and unlawful assembly.

(*m*) S. 4.

give evidence upon such prosecution, though an inhabitant of the parish or place, and though he may have entered into the before mentioned recognizance. The tenth section enacts, that no indictment shall be removed by *certiorari*, but shall be tried at the same sessions or assizes where it shall have been preferred (unless the court shall think proper, upon cause shewn, to adjourn the same,) notwithstanding any such writ or allowance. Upon this last clause it has been decided, that the general words do not restrain the crown from removing the indictment by certiorari: there being nothing in the act to shew that the legislature intended that the crown should be bound by it. (*n*)

Certiorari.

Any number of persons may be included in the same indictment for keeping different disorderly houses, stating that they "severally" kept, &c. such houses. (*o*) It seems that it is necessary to state where the house is situate, and the time, so as to make a particular statement of the offence, which is the *keeping* of the house. (*p*) But particular facts need not be stated; and though the charge is thus general, yet at the trial evidence may be given of particular facts, and of the particular time of doing them. (*q*) It is not necessary to prove who frequents the house, for that may be impossible; but if any unknown persons are proved to be there, behaving disorderly, it is sufficient to support the indictment. (*r*)

Indictment and evidence as to disorderly houses.

(*n*) Rex *v.* Davies and others, 5 T. R. 626.

(*o*) 2 Hale 174. where it is said, "It is common experience at this "day that twenty persons may be "indicted for keeping disorderly "houses or bawdy-houses: and they "are daily convicted upon such in-"dictments, for the word *separa-"liter* makes them several indict-"ments." And in Rex *v.* Kingston and others, 8 East. 41. it was held, that it is no objection on *demurrer* that several different defendants are charged in different counts of an indictment for offences of the same nature; though it may be a ground for application to the discretion of the court to quash the indictment.

(*p*) By Buller, J. in J'Anson *v.* Stuart, 1 T. R. 754.

(*q*) By Lord Hardwicke, in Clarke *v.* Periam, 2 Atk. 339.

(*r*) J'Anson *v.* Stuart, 1 T. R. 754. by Buller, J.

Open lewdness and indecent exposure.

In general all open lewdness grossly scandalous is punishable by indictment at the common law: and it appears to be an established principle that whatever openly outrages decency, and is injurious to public morals, is a misdemeanor. (*s*) In a late case it was held to be an indictable offence for a man to undress himself on the beach and to bathe in the sea near inhabited houses, from which he might be distinctly seen; although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. M'Donald, C. B. ruled, that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. (*t*) And to shew a being of unnatural and monstrous shape for money is a misdemeanor. (*u*)

Eaves droppers.

Eaves droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance, and presentable at the court leet: or are indictable at the sessions, and punishable by fine and finding sureties for their good behaviour. (*w*)

Common scold.

A *common scold*, *communis rixatrix*, (for our law confines it to the feminine gender) is a public nuisance to her neigh-

(*s*) 1 Hawk. P. C. c. 5. s. 4. 3 Burn. Just. *Lewdness*. 4 Blac. Com. 65. (*n*) 1 East. P. C. c. 1. s. 1.

(*t*) Rex *v.* Crunden, 2 Campb. 89. And the court of King's Bench, when the defendant was brought up for judgment, expressed a clear opinion that the offence imputed to him was a misdemeanor, and that he had been properly convicted. In Rex *v.* Sir Charles Sedley, Sid. 168. 1 Keb. 620. S. C. the defendant being indicted for shewing himself naked from a balcony in Covent Garden to a great multitude of people, confessed the indictment, and was sentenced to pay a fine of 2000 marks, to be imprisoned a week, and to give security for his good behaviour for three years.

(*u*) Harring *v.* Walrond, 2 Cha. Cas. 110. the case of a monstrous child that died, and was embalmed to be kept for shew, but was ordered by the lord chancellor to be buried—(cited in Burn. Just. *Nuisance*).

(*w*) 4 Blac. Com. 167, 168. 1 Burn. Just. *Eaves Droppers*.

bourhood, and may be indicted for the offence; and, upon conviction, punished by being placed in a certain engine of correction called the trebucket or cucking stool. (*x*) And she may be convicted without setting forth the particulars in the indictment: (*y*) though the offence must be set forth in technical words, and with convenient certainty; and the indictment must conclude not only against the peace, but to the common nuisance of divers of his majesty's liege subjects. (*z*) It is not necessary to give in evidence the particular expressions used; it is sufficient to prove generally that the defendant is always scolding. (*a*)

Noises in the night.

A defendant was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood: which the court held to be a nuisance. (*b*)

Spreading infection.

The exposing in public places persons infected with contagious disorders, so that the infection may be communicated, is a nuisance, and has been already treated of in a preceding chapter. (*c*)

Mastiff unmuzzled.

It is said that a *mastiff*, going in the street unmuzzled, from the ferocity of his nature being dangerous and cause of terror to his majesty's subjects, seems to be a common nuisance; and that, consequently, the owner may be indicted for suffering him to go at large. (*d*)

(*x*) 1 Hawk. P. C. c. 75. s. 14. 4 Blac. Com. 168. Burn. Just. *Nuisance*, III. *Cuck*, or *guck*, in the Saxon language, (according to Lord Coke) signifies to scold or brawl; taken from the bird *cuckow*, or *guckhaw*: and *ing* in that language signifies water, because a scolding woman, when placed in this stool, was for her punishment soused in the water. 3 Inst. 219.

(*y*) 2 Hawk. P. C. c. 25. s. 59.

(*z*) Rex *v.* Cooper, 2 Str. 1246.

(*a*) By Buller, J. in J'Anson *v.* Stuart, 1 T. R. 754.

(*b*) Rex *v.* Smith, 1 Str. 704. And see a precedent of an indictment for keeping dogs which made noises in the night, 2 Chit. Crim. L. 647.

(*c*) *Ante*, Chap. IX. p. 157. *et sequ.*

(*d*) 3 Burn. Just. *Nuisance*, I. And see a precedent of an indictment for this offence, 3 Chit. Crim.

Nuisances by statutes.

There are also some offences which are declared to be nuisances by the enactments of particular statutes.

Fireworks. 9 & 10 W. III. c. 7.

By the 9 and 10 W. III. c. 7. it is enacted, that it shall not be lawful for any person to make, or cause to be made, or to sell or utter, or offer or expose to sale, any squibs, rockets, serpents, or other *fireworks*, or any cases, moulds, or other implements for the making any such squibs, &c. or for any person to permit or suffer any squibs, &c. to be cast, thrown, or fired from out of or in his house, lodging, or habitation, or any place thereto belonging or adjoining, into any public street, highway, road, or passage, or for any person to throw, cast off, or fire, or be aiding or assisting in the throwing, casting, or firing of any squibs, &c. in or into any public street, house, shop, river, highway, road, or passage, "and that every such offence shall be a common nuisance." The statute also imposes pecuniary penalties for these offences, to be inflicted upon conviction before a magistrate; but as it declares the offences to be common nuisances, they may clearly be also prosecuted by indictment. (*e*)

Lotteries. 10 & 11 W. III. c. 17.

By the 10 and 11 W. III. c. 17. all *lotteries* are declared to be public nuisances; and all grants, patents, and licences, for such lotteries to be against law. But for many years past it has been found convenient to the government to raise money by the means of them; and accordingly different state lottery acts have been passed to license and regulate offices for lotteries. (*f*)

L. 613. It should be observed, however, that the offence seems to be stated too generally in the authority from which the text is taken. To permit a *furious* mastiff or bull dog to go at large and unmuzzled may be a nuisance; but those dogs are frequently quiet and gentle in their habits, except when incited by their owners; and it can hardly be said to be a nuisance to permit them to go at large and unmuzzled, because some of their breed are ferocious.

(*e*) *Ante*, p. 65, 66. The pecuniary penalties are imposed by s. 2. and 3. of the statute. And see 2 Burn. Just. *Fireworks*.

(*f*) See the acts collected, 2 Burn. Just. *Gaming*, III.

Bubbling the public by trading adventures, 6 G. I. c. 18. s. 19.

By the 6 Geo. I. c. 18. s. 19. it is enacted that all undertakings, attempts, and projects, by public subscriptions (as mentioned in section 18, and the other preceding sections of the act) for adventuring in certain schemes of commerce, tending to the common grievance of his Majesty's subjects, or a great number of them, and the receiving and paying of any money upon such subscriptions, &c.; and more particularly the presuming to act as a body corporate, or to raise transferable funds, or pretending to act under any charter formerly granted from the crown for any particular or special purpose therein expressed, by persons making or endeavouring to make use of such charter, for any such other purpose not thereby intended, and all acting or pretending to act, under any such obsolete charter, &c. &c. shall be deemed a public nuisance and nuisances; and the offenders be liable to such fines, penalties, and punishments, as are inflicted on a conviction for common and public nuisances, and moreover to any of the pains and penalties of *præmunire*.

It has been determined upon this statute, that the court has a discretionary power to inflict all, or only some, of the penalties of a *præmunire*, upon a conviction of the offence therein mentioned. (*g*)

Case of the *Birmingham* flour and bread company.

A recent case has been decided upon the construction of this statute. A great number of persons at *Birmingham*, namely, two thousand five hundred, admitting of an extension to twenty thousand, covenanted by a deed of copartnership to raise a large capital of twenty thousand pounds by small subscriptions of one pound for each share, for the purpose of buying corn, grinding it, making bread, and dealing in, and distributing flour and bread amongst the partners, under the name and firm of "*The Birmingham Flour and Bread Company*," and under the management of a committee: and they covenanted also that no

(*g*) Caywood's case, 1 Str. 472. 1 Hawk. P. C. c. 75. s. 11.

partner should hold more than 20 shares, unless the same should come to him by marriage, &c. or act of law; and that each member should purchase of the co-partnership weekly a certain quantity of bread or flour, not exceeding one shilling in value for each share, as the committee should appoint; and that no partner should assign his share, unless the assignee should enter into covenant with the other partners, for the performance of all covenants in the original deed; and that the majority of partners at a public meeting might make bye laws to bind the whole. An indictment was framed against several of the partners upon this statute of 6 Geo. 1. c. 18. s. 18, 19. as for a public nuisance, upon which the jury found specially that the company was originally, (during the high price of provisions), instituted *from laudable motives, and for the purpose of more regularly supplying the town of Birmingham and its neighbourhood with flour and bread; and that the same was originally, and still was, beneficial to the inhabitants at large;* but was (*i. e.* at the time of finding the special verdict, which did not include the time of the offence charged in the indictment,) prejudicial to the bakers and millers of the town and neighbourhood in their trades. After argument, and time taken by the court for consideration of the case, judgment was given for the defendants on the grounds, 1. That the fact of any nuisance was negatived by the special verdict *during the time to which the offences charged related;* and, 2. That though the defendants were found to have raised a large capital by small subscriptions, which was one ingredient of a nuisance mentioned in the act; and though the shares were made transferable to a certain extent, (*but to a certain extent only*) namely, upon the vendee's entering into similar covenants with the original partners, which might be another ingredient of a nuisance in the act; and though the defendants had assumed certain equivocal indicia of a corporation, namely, the taking a common name, having a managing committee, general meetings, and a power to make bye-laws; yet that all these things being done *for the purpose of buying corn, and making it into flour and*

bread for the supply of the partners, which did not, upon the face of it, appear to be a dangerous and mischievous undertaking, tending to the common grievance, &c., nor was found in fact so to be; and not being one of the specific nuisances prohibited by the statute; the case was not within the terms and intent of the nuisances thereby created. (*h*)

Qu. If the mere raising transferable stock is, per se, an offence within the act.

In this case the court also said, that it might admit of doubt whether the mere raising transferable stock is in any case, per se, an offence against the act, unless it has relation to some undertaking or project which has a tendency to the common grievance, prejudice, or inconvenience, of his Majesty's subjects, or of great numbers of them. (*i*) But where there was a scheme for raising a great sum by subscriptions for trading purposes, and making the shares in the joint stock transferable, it appears to have been considered that the inviting of such subscriptions by holding out false and illegal conditions, such as that the subscribers would not be liable beyond the amount of their respective shares, was an offence within the act, though the scheme might not be in itself unlawful and prohibited, without reference to the fact of its tendency in the particular instance in the opinion of a court and jury. (*k*)

(*h*) Rex *v.* Webb and others, 14 East. 406.

(*i*) 14 East. 421.

(*k*) Rex *v.* Dodd, 9 East. 516. But in this case, as the statute had not been acted upon for a great length of time, and was sought to be enforced by a private relator, who seemed not to have been deluded by the project, but to have subscribed with a view to the application, the Court refused to interfere by granting an information, though they discharged the rule without costs. And the court of Common Pleas refused to decide the question whether the *Golden-Lane Brewery* were a nuisance within this statute upon a motion to set aside a judgment confessed to them, Brown *v.* Holt, 4 Taunt. 587. But where B. being employed by A. to purchase for him certain transferable shares in an unincorporated company, charged and received from him £25. beyond the market price of such shares at the time; it was ruled at *Nisi Prius* that an action would not lie to recover back this sum, the company being within the statute, and the parties *in pari delicto*. Buck *v.*

Of the removal of nuisances.

It is laid down in the books that any one may pull down, or otherwise destroy, a common nuisance; and it is said that if any one, whose estate is, or may be, prejudiced by a private nuisance, may justify the entering into another's ground, and pulling down and destroying such nuisance, surely it cannot but follow *a fortiori* that any one may lawfully destroy a common nuisance. (*l*) And it is also said that it seems that in a plea justifying the removal of a nuisance, the party need not shew that he did as little damage as might be: (*m*) but this may perhaps be doubted, as even where there is a judgment to abate a nuisance, it is only to abate so much of the thing as makes it a nuisance. (*n*)

Of the prohibition of them by writ from the King's Bench.

It is also stated as the better opinion, that the court of King's Bench may by a mandatory writ *prohibit* a nuisance, and order that it shall be abated; and that the party disobeying such writ will be subject to an attachment. (*o*) Such writs appear to have been granted in some cases; and the proceeding in one case was that the judges, upon view, ordered a record to be made of the nuisance, and sending for the offender ordered him to enter into a recognizance not to proceed; but he refusing to comply, the court committed him for the contempt, issued a writ to the sheriff, on the record made, to abate the building, and ordered the offender to be indicted for the nuisance. (*p*)

Of the indictment in cases of nuisance.

But the more usual course of proceeding in cases of nuisance is by *indictment*, in which the nuisance should be described according to the circumstances; and it should be stated to be continuing, if that be the fact. (*q*) The offence

Buck, 1 Camph. 547. and see Rex v. Stratton and others, in a note to Buck v. Buck.

(*l*) 1 Hawk. P. C. c. 75. s. 12. 5 Bac. Abr. *Nuis.* (C).

(*m*) *Id. Ibid.*

(*n*) *Post*, 446.

(*o*) 5 Bac. Abr. *Nuis.* (C).

(*p*) Hall's case, 1 Mod. 76. 1 Vent. 169. S. C. and Hale, C. J. mentioned another case in 8 Car. 1. of a writ to prohibit a bowling-alley erected near St. Dunstan's church.

(*q*) Rex v. Stead, 8 T. R. 142. otherwise there will not be judgment to abate it.

should be charged to be done *ad commune nocumentum*, "to "the common nuisance of all the liege subjects, &c." (*r*) But an indictment against a common scold, using the words *communis rixatrix*, has been considered to be good, though it concluded *ad commune nocumentum diversorum*, instead of *omnium*, because from the nature of the thing it could not but be a common nuisance. And Hawkins says that for the same reason it may be argued that an indictment, with such a conclusion, for a nuisance to a river, plainly appearing to be a public navigable river, or to a way, plainly appearing to be a highway, is sufficient: and he says that perhaps the authorities which seem to contradict this opinion might go upon this reason, that in the body of the indictment it did not appear, with sufficient certainty, whether the way wherein the nuisance was alleged were a highway, or only a private way; and that therefore it should be intended, from the conclusion of the indictment, that the way was private. (*s*) The safer mode, however, will be to lay the offence to have been committed "to the common nui- "sance of all the liege subjects, &c."

The defendant cannot excuse himself by shewing that the nuisance has existed for a long time.

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time; as however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances though of longer standing. (*t*) It has been held that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage in the town, leaving sufficient room for passengers: for it is against law to prescribe for a nui-

(*r*) Vin. Abr. *Indictment* (Q) *Nuisance*, 13. Prat *v.* Stearn, Cro. Jac. 382. Sir Rowland Hayward's case, Cro. Eliz. 148. Anon. 1 Ventr. 26. 2 Roll. Abr. 83. 1 Hawk. P. C. c. 75. s. 3, 4, 5. and the authorities there cited: and see 5 Bac. Abr. *Nuis.* (B). In 6 East. 315. Rex *v.* Reynell, there is an indictment for not repairing the fences of a churchyard "to the "nuisance of the *inhabitants of* "*the parish*." But *qu.*

(*s*) 1 Hawk. P. C. c. 75. s. 5.

(*t*) Weld *v.* Hornby, 7 East. 199.

sance. (*u*) And Lord Ellenborough, C. J. said in a late case, "It is immaterial how long the practice may have "prevailed, for *no length of time will legitimate a nuisance.* "The stell fishery across the river at *Carlisle* had been "established for a vast number of years; but Mr. Justice "Buller held that it continued unlawful, and gave judg- "ment that it should be abated." (*w*) But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes, for above twenty years, and that the defendant put the bags there for the purpose of sale, Lord Ellenborough, C. J. said that after twenty years' acquiescence, and it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal who came there under the belief that it was such fair, or market, legally instituted. (*x*)

No length of time will legalize a public nuisance.

All common nuisances are regularly punishable by fine and imprisonment; but, as the removal of the nuisance is usually the chief end of the indictment, the court will adapt the judgment to the nature of the case. Where the nuisance therefore is stated in the indictment to be *continuing*, and does in fact exist at the time of the judgment, the defendant may be commanded by the judgment to remove it at his own costs: (*y*) but only so much of the thing as causes the nuisance ought to be removed; as if a house be built too high, only so much of it as is too high should be pulled down; and if the indictment were for keeping a dyehouse, or carrying on any other stinking trade, the judgment would not be to pull down the building where the

Of the judgment in cases of nuisance.

(*u*) Fowler *v.* Sanders, Cro. Jac. 446.

(*w*) Rex *v.* Cross, 3 Camph. 227.

(*x*) Rex *v.* Smith and others, 4 Esp. 111.

(*y*) 2 Roll. Abr. 84. 1 Hawk. P. C. c. 75. s. 14. Rex *v.* Pappineau, 1 Str. 686.

trade was carried on. (*z*) So in the case of a glass-house the judgment was to abate the nuisance; not by pulling the house down, but only by preventing the defendant from using it again as a glass-house. (*a*) But where the indictment does not state the nuisance to be continuing, a judgment to abate it would not be proper. In a case where this point arose, Lord Kenyon, C. J. said, "When a defendant is indicted for an existing nuisance, it is usual to "state the nuisance and its continuance down to the time "of taking the inquisition; it was so stated in Rex *v.* Pappineau, 'et adhuc existit;' and in such cases the judgment "should be that the nuisance be abated. But in this case "it does not appear in the indictment that the nuisance was "then in existence; and it would be absurd to give judgment to abate a supposed nuisance which does not exist. "If however the nuisance still continue, the defendant may "be again indicted for continuing it." (*b*)

Costs upon an indictment for a nuisance where the defendant had removed it by certiorari, and been convicted.

The statute 5 W. & M. c. 11. s. 3. enacts that if a defendant prosecuting a writ of *certiorari* (as mentioned in the act) be convicted of the offence for which he is indicted, the court of King's Bench shall give reasonable costs to the prosecutor if he be the *party grieved*, or be a justice, &c. or other civil officer, who shall prosecute for any fact that concerned them as officers to prosecute or present. Upon this clause it was decided in a recent case, that persons dwelling near to a steam engine, which emitted volumes of smoke affecting their breath, eyes, cloaths, furniture, and dwelling houses, and prosecuting an indictment for such nuisance, are *parties grieved* entitled to their costs, the defendants having removed the indictment from the sessions by certiorari, and been afterwards convicted. (*c*)

(*z*) Rex *v.* Pappineau, *ante*, note (*y*) 9 Co. 53. Godb. 221.

(*a*) Co. Ent. 92. b.

(*b*) Rex *v.* Stead, 8 T. R. 142. A strong opinion was intimated upon the point when the same case was previously brought before the court in another shape, Rex *v.* the Justices of Yorkshire, 7 T. R. 468.

(*c*) Rex *v.* Dewsnap and another, 16 East. 194.

SECT. II.

OF NUISANCES TO PUBLIC HIGHWAYS.

Of nuisances to public highways.

In treating of nuisances to *public highways*, we may consider in the first place what is a public highway; secondly, of nuisances to a public highway by obstruction; and, thirdly, of nuisances to a public highway by the neglect, on the part of those who are liable, to put it in repair.

What is a public highway.

Highway is said to be the *genus* of all public ways; (*d*) of which there are three kinds, a footway; a foot and horse-way, which is also a pack and prime-way; and a foot horse and cart way. (*e*) Whatever distinctions may exist between these ways, it seems to be clear that any of them, when common to all the king's subjects, whether directly leading to a market-town, or beyond a town as a thoroughfare to other towns, or from town to town, may properly be called a highway; and that the last, or more considerable, of them, has been usually called the *king's* highway. (*f*) But a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, is not a highway; because it belongs not to all the king's subjects, but only to some particular persons, each of whom, as it seems, may have an action on the case for a nuisance therein. (*g*)

(*d*) Reg. *v.* Saintiff, 6 Mod. 255.

(*e*) Co. Lit. 56 a. But it is not to be understood by the term *cart-way*, that the way is to be used with the particular vehicle called a cart, for if it is a common highway it is a highway for all manner of things, Rex *v.* Hatfield, Cas. temp. Hardw. 315.

(*f*) *Id. Ibid.* 1 Hawk. P. C. c. 76. s. 1. 3 Bac. Abr. *Highways* (A).

(*g*) 1 Hawk. P. C. c. 76. s. 1. So by Hale, C. J. in Austin's case, 1 Vent. 189. A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house, or village, or to fields, it is a private way.

The number of persons therefore who may be entitled to use the way, or may be obliged to repair it, will not make it a public way, if it be not common to *all* the king's subjects. Thus where the commissioners under an inclosure act set out a private road for the use of the inhabitants of nine parishes, directing the inhabitants of six of those parishes to keep it in repair, it was held that no indictment could be supported against those six parishes for not repairing it; because it did not concern the public. It was argued, amongst other reasons in support of the indictment, that there was no other remedy; for that there were not less than 250 persons who were liable to the repair of the road, and that the difficulty of suing so many persons together was almost insuperable. But the court said that, however convenient it might be that the defendants should be indicted, there was no legal ground on which this indictment could be supported; that the known rule was that those matters only which concerned the public were the subject of an indictment; that the road in question, being described to be a private road, did not concern the public, nor was of a public nature, but merely concerned the individuals who had a right to use it; and that the question was not varied by the circumstance that many individuals were liable to repair, or that many others were entitled to the benefit of this road. (*h*)

The number of persons using a way or repairing it will not make it a public way if it be not common to all the king's subjects.

Though a highway is said to be the king's, yet this must be understood as meaning that in every highway the king and his subjects may pass and repass at their pleasure; for the freehold and all the profits, as trees, mines, &c. belong to the lord of the soil, or to the owner of the lands on both sides the way. (*i*) The rights, however, of the owner of the soil will be subject to those of the public as to their exercise of their right of way in its full extent. Thus it seems to be established, that if a common highway is so foundrous and out of repair as to become impassable, or even danger-

The freehold and the profits (as mines, trees, &c.) of a highway belong to the lord of the soil.

(*h*) Rex *v.* Richards, 8 T. R. 634. 3 Com. Dig. *Chemin* (A. 2)

(*i*) 3 Bac. Abr. *Highways* (B).

ous to be travelled over, or incommodious, the public have a right to go upon the adjacent ground; and that it makes no difference whether such ground be sown with grain or not. (*k*) But it is a right of passage only which is given up by the owner of the soil, even where the way is dedicated by him to the public. Thus where, in an action of trespass, a case was made that the place where the supposed trespass was committed was formerly the property of the plaintiff, who some years ago had built a street upon it, which had ever since been used as a highway, that the defendant had lands contiguous, parted only by a ditch, over which ditch he had laid a bridge, the end of which rested on the highway; and it was insisted, for the defendant, that by the plaintiff's having made this a street, it was a dedication of it to the public, and that he could not therefore sue as for a trespass on his private property; the court held that though it was a dedication to the public, so far as the public had occasion for it, which was only for a right of passage, it never was understood to be a transfer of the absolute property in the soil. (*l*)

A way may become public by a dedication of it by the owner of the soil to the public use.

A way may become a public highway by a *dedication* of it, by the owner of the soil, to the public use. Thus where the owners of the soil suffered the public to have the free passage of a street in *London*, though not a thoroughfare, for eight years, without any impediment (such as a bar set across the street, and shut at pleasure, which would shew the limited right of the public,) it was held a sufficient time for presuming a dereliction of the way to the public. (*m*) And though if the land had been under lease during that

(*k*) 1 Roll. Abr. 390 (A) pl. 1. and (B) pl. 1. Absor *v.* French, 2 Show. 28. Taylor *v.* Whitehead, Dougl. 749.

(*l*) Sir John Lade *v.* Shepherd, 2 Str. 1004.

(*m*) Trustees of the Rugby Charity *v.* Merryweather, 11 East. 375. in the note. Lord Kenyon also said "In a great case, which was "much contested, six years was "held sufficient." But some observations were made upon this doctrine in a late case of Woodyer *v.* Hadden, 5 Taunt. 125. post. 452. note (*t*).

time, or even for a much longer period, the acquiescence of the tenant would not, it seems, have bound the landlord, without evidence of his knowledge: (*n*) yet it has been held that where a way has been used by the public for a great number of years over a close in the hands of a succession of tenants, the privity of the landlord, and a dedication by him to the public, may be presumed, although he was never in the actual possession of the close himself, and he is not proved to have been near the spot. (*o*) And it was also held in this case that where a way has been so used, notice of the fact to the steward is notice to the landlord. (*p*) In a case where it appeared that a passage, leading from one part to another of a public street, (though by a very circuitous route) made originally for private convenience, had been open to the public for a great number of years, without any bar or chain across it, and without any interruption having been given to persons passing through it, it was ruled that this must be considered as a way dedicated to the public. (*q*) But the erection of a bar, to prevent the passing of carriages, rebuts the presumption of a dedication to the public; although the bar may have been long broken down: and though such a bar do not impede the passing of persons on foot, no public right to a footway is acquired, as there can be no partial abandonment to the public. (*r*) And it has been ruled that the owner of the soil may replace the bar after it has been taken away for twelve years. (*s*) It seems also, that in every case the facts must be considered as sufficient to shew that the owner meant to give the public a right of way over his soil, before a dedication by him will be presumed. Thus in a late case, where the plaintiff erected a street, leading out of a highway across his own close, and terminating at the edge of the defendant's

(*n*) Trustees of the Rugby Charity *v.* Merryweather, 11 East. 375.

(*o*) Rex *v.* Barr, 4 Campb. 16.

(*p*) *Id. Ibid.*

(*q*) Rex *v.* Lloyd, 1 Campb. 260.

(*r*) Roberts *v.* Karr, *cor.* Heath, J. *Kingston* Lent Ass. 1808. 1 Campb. 261, note (*b*).

(*s*) Lethbridge *v.* Winter, *Somerset* Spr. Assiz. 1808. *cor.* Marshal, Serjt. 1 Campb. 263. in the note.

adjoining close, which was separated by the defendant's fence from the end of the street for twenty-one years, during nineteen of which the houses were completed, and the street publicly watched, cleansed, and lighted, and both footways and half the horseway paved, at the expence of the inhabitants, it was held that this street was not so dedicated to the public that the defendant, pulling down his wall, might enter it at the end adjoining to his land, and use it as a highway. (*t*)

An ancient highway may be changed by writ of *ad quod damnum*.

By the common law an ancient highway cannot be changed without the king's licence first obtained upon a writ of *ad quod damnum*, and an inquisition thereon found that such a change will not be prejudicial to the public: and it is said that if one change a highway without such authority he may stop the new way whenever he pleases; and it seems that the king's subjects have not such an interest in such new way as will make good a general justification of their going in it as in a common highway; but that in an action of trespass, brought by the owner of the land against those who shall go over it, they ought to shew, specially, by way of excuse, how the old way was obstructed, and the new one set out. And it is also said that the inhabitants are not bound to keep watch in such new way, or to make amends for a robbery therein committed, or to repair it. (*u*)

(*t*) Woodyer and another *v.* Hadden, 5 Taunt. 125. Chambre, J. *dissent*. In this case Mansfield, C. J. said, "No one can respect "Lord Kenyon more than I do; "but I always thought, as to the "*Rugby* case, (*ante*, 450, note *m*.) "there was reason to doubt. I "never could discover when the "dedication began: he says that "during the lease there was no de- "dication, but that eight years' "acquiescence afterwards were "sufficient: he says that in ano- "ther case six years were held to be "enough, not naming the case;— "if six, why not one? Why not "half a year? It would then be- "come necessary for every rever- "sioner, coming into possession "of his estate after a lease, in- "stantly to put up fences all round "his property, to prevent dedica- "tion." And see Rex *v.* Hudson, 2 Str. 909.

(*u*) 1 Hawk. P. C. c. 76. *s.* 3.

A highway may be changed by the act of God.

It is certain that a highway may be changed by the act of God; and therefore it has been holden that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel in the same manner as in the old. (*w*)

13 Geo. III. c. 78. gave power to justices to widen and change highways.

By the statute 13 Geo. III. c. 78. a power was given to the justices of peace to widen, divert, and change, highways as they should judge most convenient. This power was in aid of the common law, and in order to render the changing of highways less troublesome and expensive.

This statute enacts, that the surveyor shall make every public cartway, leading to any market town, twenty feet wide at the least; and every public horseway or drift way eight feet wide at the least, if the ground between the fences inclosing the same will admit thereof. (*x*) And that where it shall appear, upon the view of two justices, that any highway between the fences thereof is not of sufficient breadth, and may be conveniently widened and enlarged, or that the same cannot be conveniently enlarged and made commodious for travellers, without diverting and turning the same, the said justices shall order such highway to be widened and enlarged, or diverted and turned in such manner as they shall think fit, so that the said highway, when enlarged and diverted, shall not exceed thirty feet in breadth; and that neither of the said powers do extend to pull down any house or building, or to take away the ground of any garden, park, paddock, court, or yard. The statute then proceeds to empower the surveyors to agree with the owners of the ground

The writ of *ad quod dammum* is an original writ issuing out of and returnable into the chancery, directed to the sheriff, to inquire by a jury whether such change will be detrimental to the public; which inquisition being a proceeding only *ex parte*, is in its own nature traversable; and heretofore the party grieved might be heard against it before the chancellor. 2 Burn. Just. *Highways*, S. XI.

(*w*) 1 Hawk. P. C. c. 76. s. 4.

(*x*) S. 15.

wanted for such purposes, for their recompence; and provides, that if they cannot agree, the same may be assessed by a jury at the quarter sessions: and, after directing the proceedings in such event, it enacts that, "upon payment or "tender of the money, so to be awarded and assessed, to the "person or persons, bodies politic or corporate, entitled to "receive the same, or leaving it in the hands of the clerk "of the peace of such limit, in case such person, &c. cannot "be found, or shall refuse to accept the same, for the use "of the owner of, or others interested in the said ground, "the interest of the said person, &c. in the said ground "shall be for ever divested out of them; and the said "ground, after such agreement or verdict as aforesaid, shall "be esteemed and taken to be a public highway, to all in-"tents and purposes whatsoever."(*y*) When such new highway is made, the old highway is to be stopped up, and the land thereof sold by the surveyor in the manner directed in the act; but if such old road shall lead to any place which cannot, in the opinion of the justices, be accommodated with a convenient way or passage from the new highway, then the old highway is only to be sold, subject to the right of way and passage to such place.(*z*)

This power of justices to order roads to be widened extends to roads repairable *ratione tenuræ*.

It has been decided, that the power thus given to two justices to order any highway to be widened extends to roads repairable *ratione tenuræ;* and that upon disobedience to such order the party may either be proceeded against summarily under the statute, or by an indictment as for an offence at common law.(*a*)

13 Geo. III. c. 78. s. 19. repealed in part by 55 Geo. III. c. 68.

The nineteenth section of this statute then enacted, that highways, bridleways, and footways, might be turned by the justices, at their special sessions, with the consent of the owners of the lands, so as to make them nearer and more

(*y*) S. 16. There is a saving to the owners of the ground of mines, timber, &c.

(*z*) S. 17.

(*a*) 1 Hawk. P. C. c. 76. s. 57. Rex *v.* Balme, Cowp. 648.

convenient to the public; and provided for an appeal to the quarter sessions by persons injured by any such proceeding, or by the inclosure of any road by an inquisition upon a writ of *ad quod damnum:* but this part of the section is repealed by a recent statute, 55 Geo. III. c. 68. which recites that it was expedient that more public notice should be given of any order or proceeding for diverting or stopping any such ways; and also that a greater facility of appeal to the quarter sessions against such order or proceeding should be given to any person aggrieved thereby; and also that the justices of peace should have power, under certain regulations, to stop up unnecessary highways, bridleways, and footways.

55 Geo. III. c. 68. s. 2. Justices may, in certain cases, with the consent of the owners of the lands, by order at a special sessions, divert, &c. highways, bridleways, and footways.

The second section of the statute 55 Geo. III. then enacts, that when it shall appear, "upon the view of any two or more "of the said justices of the peace, that any public highway, "or public bridleway or footway, may be diverted, so as to "make the same nearer or more commodious to the public, "and the owner or owners of the lands and grounds "through which such new highway, bridleway, or footway "so proposed to be made, shall consent thereto, by writing "under his or their hand and seal, or hands and seals, it "shall and may be lawful, by order of such justices, at some "special sessions, to divert and turn, and to stop up such "footway, and to divert, turn, stop up, and inclose, sell, and "dispose of, such old highway or bridleway, and to pur-"chase the ground and soil for such new highway, bridle-"way, or footway, by such ways and means, and subject to "such exceptions and conditions, in all respects, as in the "said recited act mentioned with regard to highways to be "widened or diverted; (*b*) and also when it shall appear, "upon the view of any two or more of the said justices of "the peace, that any public highway, bridleway, or foot-"way, is unnecessary, it shall and may be lawful, by order "of such justices, or any two of them, to stop up, and to sell

And the justices may also order unnecessary highways, bridleways, and footways to be stopped up.

(*b*) 13 Geo. III. c. 78. s. 16. *Ante*, 453, 454.

" and dispose of, such unnecessary highway, bridleway, or " footway, by such ways and means, and subject to such " exceptions and conditions in all respects as in the said " recited act is mentioned, in regard to highways to be " widened and diverted; except that the money to arise " from such sale, where, by the said act, it would be appli- " cable to the purchase of the ground and soil of the new " highways or bridleways therein mentioned, shall be paid " to the surveyor or surveyors, and be applied towards the " general repairs of the highways and bridleways of the " parish, township, or place, within which the said highway, " bridleway, or footway, so stopped up, shall be situate: " provided that in the several cases before mentioned a no- " tice, in the form or to the effect of the schedule (*c*) to this " act annexed, shall be affixed in legible characters at the " place and by the side of the said highway, bridleway, or " footway, from whence the same is directed to be turned, " diverted, or stopped up, and also inserted in one or more " newspaper or newspapers published or generally circu- " lated in the county where the parish, township, or place, " in which the highway, bridleway, or footway, so ordered " to be diverted and turned, or stopped up, as the case may " be, shall lie, (or, in case no such newspaper shall be so " published or circulated in such county, then in any news- " paper or newspapers published or circulated in the nearest " adjoining county) for three successive weeks after the

But a notice must be affixed at the place, &c. be inserted in a newspaper, and also affixed to the door of the church, &c.

(*c*) The form of the notice is this: " Notice is hereby given, that on the day of last an order was signed by J. W. and T. H. two of his majesty's justices of the peace in and for the county of for (*if the order be for* turning, diverting, and stopping up, &c. *here so state it, and describe the road ordered to be* turned, diverted, and stopped up;—*if the order be for* stopping up a useless road, *here so state it, and describe the road ordered to be stopped up:*) and that the said order will be lodged with the clerk of the peace for the said county, at the general quarter sessions of the peace to be holden at in and for the said county, on the day of next; and also that the said order will, at the said quarter sessions, be confirmed and enrolled, unless upon an appeal against the same to be then made it be otherwise determined."

" making of such order; and a like notice shall be affixed " to the door of the church or chapel of every parish or " township in which such highway, bridleway, or footway, " so ordered to be diverted, turned, or stopped up, or any " part thereof, shall lie, on three successive *Sundays* subse- " quent to the making of such order; and the said several " notices having been so published, the said order shall, at " the quarter sessions which shall be holden within the " limit where the highway, bridleway, or footway, so di- " verted and turned, or stopped up, shall lie, next after the " expiration of four weeks from the first day on which such " notices shall have been published as aforesaid, be returned " to the clerk of the peace in open court, and lodged with " him; and the said order shall, at such quarter sessions, be " confirmed, and by the clerk of the peace enrolled amongst " the records of the said court of quarter sessions."

And then the order is to be returned to the clerk of the peace at the quarter sessions, and be confirmed and enrolled.

The third section provides for an appeal to the quarter sessions by any person aggrieved by such order or proceeding, or by the inclosure of any road by an inquisition upon a writ of *ad quod damnum;* and enacts, " that where any " such highway, bridleway, or footway, shall be so ordered " to be stopped up or inclosed, and such new highway, bri- " dleway, or footway, set out and appropriated in lieu " thereof as aforesaid; or where any unnecessary highway, " bridleway, or footway, shall be so ordered to be stopped " up as aforesaid; it shall and may be lawful for any person " or persons injured or aggrieved by any such order or pro- " ceeding, or by the inclosure of any road or highway, by " virtue of any inquisition taken upon any writ of *ad quod* " *damnum*, to make his or their complaint thereof, by appeal " to the justices of the peace at the said quarter sessions, " upon giving ten days' notice in writing of such appeal to " the surveyor of the highways of the parish, township, or " place, wherein such highway, bridleway, or footway, shall " be situated; and also affixing such notice to the door of " the church or chapel of such parish, township, or place; " and the said court of quarter sessions is hereby authorized

55 Geo. III. c. 68. s. 3. gives an appeal to the sessions by any person aggrieved by such order or proceeding, or by the inclosure of any road upon a writ of *ad quod damnum* upon giving ten days' notice.

" and empowered to hear and finally determine such ap-
" peal."

55 Geo. III. c. 68. s. 4. If no appeal be made, or if the order be confirmed, the ways may be stopped, and the proceedings are to be binding and conclusive, and the new highways, &c. are to be public highways, &c. to all intents and purposes.

The fourth section then enacts, " that if no such appeal
" be made, or, being made, such order and proceedings shall
" be confirmed by the said court, the said inclosures may be
" made, and the said ways stopped; and the proceedings
" thereupon shall be binding and conclusive to all persons
" whomsoever; *and the new highways, bridleways, and foot-*
" *ways, so to be appropriated and set out, shall be and for*
" *ever after continue a public highway, bridleway, or foot-*
" *way, to all intents and purposes whatsoever:* but no inclo-
" sures of such old highways, bridleways, or footways, (ex-
" cept in the case of stopping up of such useless highways,
" bridleways, or footways, as hereinbefore is mentioned,)
" shall be made, until such new highway, bridleway, or
" footway, shall be completed and put into good condition
" and repair, and so certified by two justices of the peace
" upon view thereof; which certificate shall be returned to
" the clerk of the peace, and by him enrolled amongst the
" records of the court of quarter sessions next after such
" order as aforesaid shall have been confirmed or enrolled
" pursuant to the directions hereinbefore contained; but
" from and after the enrolment (*d*) of such order and certi-

(*d*) In section 19 of the 13 Geo. III. c. 78. the words were " from and after such certificate," but in other respects the clause was nearly similar to that in the recent statute; and upon that section it was held by the court of Common Pleas that if the orders and certificates of magistrates were delivered to the clerk of the peace to be enrolled, the statute was satisfied, although the clerk of the peace made no transcript thereof, the statute being only directory to the officer as to the enrolment; and it is doubted whether that statute intended that a transcript should be made. De Ponthieu *v.* Pennyfeather, 5 Taunt. 634. In the same case it seems to have been considered, that as the statute 13 Geo. III. did not prescribe any particular form of certificate, by the magistrates, of the new road being complete and in good condition and repair, previous to the stopping up of the old road, a recital that they had so certified, contained either in the order for diverting the road, or in the order

" ficate, such old highway, bridleway, or footway, shall be " stopped up; and the soil of such old highway or bridleway " sold, in the manner, and subject to the reservations and " restrictions in the said recited act mentioned, with re- " spect to highways to be diverted by virtue of the said re- " cited act. (*e*)"

A part of section 19 of the 13 Geo. III. c. 78. remains unrepealed by the 55 Geo. III. c. 68. and by this it is enacted that " where any highway, bridleway, or footway, " *hath been* diverted and turned above twelve months, " either from necessity, where the same have been destroyed " by floods, or slips of the ground on which they were " made, or from other causes and motives, if new highways, " bridleways, or footways, *have been* made in lieu thereof " nearer or more commodious to the public, and the same " have been acquiesced in, and no suit or prosecution hath " been commenced for the diverting or turning the same, " every new highway, bridleway, or footway, set out and " used in the place of that so diverted and turned, shall from " *henceforth* be the public highway, bridleway, or footway, " to all intents and purposes whatsoever." But it has been decided that this clause is only *retrospective* in its operation. (*f*)

13 Geo. III. c. 78. s. 19. Where ways had been diverted above 12 months, and others made in lieu thereof and acquiesced in, the new ways were to be the public ways.

It frequently happened that the boundaries of parishes passed through the middle of a highway; one side of the highway being situated in one parish, and the other side of the highway being situated in another parish, whereby great inconveniencies arose to the parishes in

34 Geo. III. c. 64. Where the boundaries of parishes are in the middle of a highway two jus-

for stopping up the old road, was a sufficient certificate within the 19th section.

(*e*) *Viz.* the 13 Geo. III. c. 78. s. 17, *ante*, 453, 454. The 55 Geo. III. c. 68. is not to annul or affect any order or proceeding made or had previous to the passing of the act. S, 5.

(*f*) Waite *v.* Smith, 8 T. R. 133. Lord Kenyon, in giving his judgment, said, " If any jobs had been " done before the act passed, that " act has certainly cured them: " but the legislature did not mean " to give a sanction to any jobs in " future."

tices may divide the highway by a transverse line.

settling the time and manner of repairing such highway: and it was therefore provided by the 34 Geo. III. c. 64. that two justices, upon application by the surveyor, may divide the whole of any such common highway, by a transverse line crossing it, into two equal parts, or into two such unequal parts and proportions as in consideration of the soil, waters, floods, the inequality of such highway, or any other circumstances, they think just. (*g*)

Highways may be changed, &c. by particular acts of parliament.

Besides the methods which have been already mentioned, roads are sometimes changed or stopped, or new ones created by turnpike acts, inclosure acts, or other acts of parliament, containing specific enactments for such purposes; but such new roads may or may not be public, according to the provisions of the particular acts; and we have seen that where a road was set out by commissioners under an inclosure act, the number of persons using or repairing it would not make it a public way, it not being common to all the king's subjects. (*h*)

And in some instances by private individuals.

In some instances a highway may, it seems, be in some measure changed or confined to a particular course by a private individual; as, where it lies over an open field, and the owner of the field turns it to another part of the field for his own convenience, or incloses the field for his own benefit, leaving a sufficient way. (*i*) But in such case, as the public had clearly a right before such alteration to go upon the adjacent ground when the way was out of repair, the owner of the field can only make the alteration subject to the onus of making a good and perfect way. (*k*)

(*g*) The act sets forth particularly the proceedings to be had for the purpose of such division; and afterwards enacts as to the liabilities of the parishes respectively to repair their portions after such division; which provisions, as to the repairing, will be further noticed in a subsequent part of this chapter, upon nuisances in *not repairing* highways.

(*h*) *Ante*, 449.

(*i*) 3 Salk. 182.

(*k*) *Id. Ibid.* And see the cases collected in Rex *v.* Stoughton, 2 Saund. 160. a note (12). And see

Of nuisances to highways by obstruction.

Having thus enquired concerning the different sorts of highways, and the methods by which they may be changed, widened, or stopped up, we may now consider of nuisances to highways by *obstructions*.

There is no doubt but that all injuries whatsoever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the king's subjects, are public nuisances at common law. (*l*) And it is clearly a nuisance at common law to erect a new gate in a highway, though it be not locked, and open and shut freely; because it interrupts the people in that free and open passage which they before enjoyed and were lawfully entitled to: but where such a gate has continued time out of mind, it shall be intended that it was set up at first by consent, on a composition with the owner of the land, on the laying out the road; in which case the people had never any right to a freer passage than what they continue to enjoy. (*m*)

Obstructions and annoyances in highways by means of trees hanging over, ditches not being scoured, carriages, &c. left in such highways, misconduct of drivers, and the excessive loading of carriages.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and an occupier, as such, though at will only, is indictable for suffering a house standing upon the highway to be ruinous; and it is said that the owner of land next adjoining to the highway, ought of common right to scour his ditches; but that the owner of land, next adjoining to such land, is not bound by the common law so to do, without a special prescription: and it is also said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance. (*n*) The general

also *post*, as to the repair of highways.

(*l*) 1 Hawk. P. C. c. 76. s. 144.

(*m*) 1 Hawk. P. C. c. 75. s. 9. and c. 76. s. 146. 3 Com. Dig. *Chemin* (A 3.)

(*n*) 3 Bac. Abr. *Highways* (E). 1 Hawk. P. C. c. 76. s. 5. 8. 147. But the building of a house in a larger manner than it was before,

highway act also relates to offences of this description, imposing pecuniary penalties upon persons obstructing highways by means of trees or hedges, and omitting to cleanse and scour their ditches, drains, and water-courses; and penalties are also imposed upon persons laying stones, timber, or other matter, or leaving any carriages, or implements of husbandry, in the highways; and also upon persons encroaching upon them. (*o*) Provision is also made for the punishment, by similar penalties, of drivers of carriages who may create annoyances in the public ways by their misconduct. (*p*) And with the view of preventing the highways from being destroyed by the narrowness of the wheels of the carriages travelling thereon, and by the excessive burdens which might be carried in them, it is enacted that no waggons, &c. the wheels of which are of a specified breadth, shall be drawn with more than a certain number of horses, on pain that the owner forfeit five pounds, and the driver ten shillings, for every horse or beast above the number. (*q*) And it has been held that if a carrier carries an unreasonable weight, with an unusual number of horses, it is a nuisance to the highway, by the common law. (*r*) And upon an information for this offence, it was adjudged, that, though it was stated that the carrier went "with an unusual number of horses," without setting forth what number, yet the information was good, because it was

whereby the street became *darker*, has been held not to be a public nuisance by reason of the darkening, Rex *v.* Webb, 1 Lord Raym. 737.

(*o*) 13 Geo. III. c. 78. s. 6, 7, 8, 9, 10, 11, 12, 13, 14, 63. which makes provision also for the removal of such annoyances by the surveyor and other persons. The different sections of the statute are abstracted in 2 Burn. Just. *Highways*, S. VIII.

(*p*) 1 Geo. I. st. 2. c. 57. 24 Geo. II. c. 43. and 30 Geo. II. c. 22. as to drivers in *London*, *Westminster*, and the neighbourhood; and 13 Geo. III. c. 78. s. 60. as to drivers in general. See the statutes abstracted, 2 Burn. Just. *Ibid.* and for enactments relative to the misconduct of drivers of public coaches, see 5 Burn. Just. *Post.* S. IV.

(*q*) 13 Geo. III. c. 78. s. 55.

(*r*) 3 Com. Dig. *Chemin* (A 3.)

the excessive weight which he carried that made the nuisance. (*s*)

Every unauthorised obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence.

It appears to have been holden that an indictment will not lie for setting a person on the footway in a street, to distribute handbills, whereby the footway was impeded and obstructed; (*t*) nor for throwing down skins into a public way by which a personal injury is accidentally occasioned: (*u*) but acts of this kind, if improperly performed, might possibly be deemed nuisances; as it seems now to be well established that every unauthorized obstruction of a highway, to the annoyance of the king's subjects, is an indictable offence. (*w*) Thus where a *waggoner* occupied one side of a public street in the city of *Exeter*, before his warehouses, in loading and unloading his waggons, for several hours at a time both day and night, and had one waggon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot-passengers were incommoded by cumbrous goods lying on the ground, on the same side, ready for loading, he was held to be indictable for a public nuisance: although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street. (*x*) Upon the same principle it has been held to be an indictable offence for *stage coaches* to stand plying for passengers in the public streets; and Lord Ellenborough, C. J. said, "A stage coach may set down or take up passengers in the "street, this being necessary for public convenience; but "it must be done in a reasonable time; and private pre-"mises must be procured for the coach to stop in during "the interval between the end of one journey and the com-"mencement of another." (*y*) In the same case his lordship intimated that there would be no doubt, but that, if coaches, on the occasion of a rout, should wait an unreason-

(*s*) Egerly's case, 3 Salk. 183.
(*t*) Rex *v.* Sermon, 1 Burr. 516.
(*u*) Rex *v.* Gill, 1 Str. 190.
(*w*) Rex *v.* Cross, 3 Campb. 227.
(*x*) Rex *v.* Russell, 6 East. 427.
(*y*) Rex *v.* Cross, 3 Campb. 224.

able length of time in a public street, and obstruct the transit of his Majesty's subjects wishing to pass through it in carriages or on foot, the persons who might cause and permit such coaches so to wait would be guilty of a nuisance. (*z*)

Laying *logs* of timber in a highway has been already stated as one of the clear instances of nuisance. (*a*) And the party will not be excused by shewing that he laid them only here and there, so that the people might have a passage through them by windings and turnings. (*b*) And though it is not a nuisance for an inhabitant of a town to unlade billets, &c. in the street before his house, by reason of the necessity of the case; yet he must do it promptly, and not suffer them to continue in the street an unreasonable length of time. (*c*) From a recent case it appears also that an obstruction to a public highway will not be excused, on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. It was proved that the defendant, who was a *timber merchant*, occupied a small timber-yard close to a street, and that from the narrowness of the street, and the construction of his own premises, he had in several instances necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there, before they could be carried into his yard: and it was contended on his behalf that he had a right to do so, as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into the cellar of a publican. But Lord Ellenborough, C. J. said "If an unreasonable time is occupied in the operation of "delivering beer from a brewer's dray into the cellar of a "publican, this is certainly a nuisance. A cart or waggon

(*z*) Rex *v.* Cross, 3 Campb. 224. P. C. c. 76. s. 145.
(*a*) *Ante*, p. 461.
(*b*) 2 Roll. Abr. 137. 1 Hawk.
(*c*) *Id. Ibid.* and 3 Bac. Abr. *Highways* (E).

"may be unloaded at a gateway; but this must be done "with promptness. So as to the repairing of a house; the "public must submit to the inconvenience occasioned ne- "cessarily in repairing the house; but if this inconvenience "is prolonged for an unreasonable time, the public have a "right to complain, and the party may be indicted for a "nuisance. The rule of law upon this subject is much "neglected, and great advantages would arise from a strict "and steady application of it. I cannot bring myself to "doubt of the guilt of the present defendant. He is not "to eke out the inconvenience of his own premises by tak- "ing in the public highway into his timber yard; and if the "street be narrow, he must remove to a more commodious "situation for carrying on his business." (*d*)

Of nuisances to highways in not repairing them.

As a nuisance in *not repairing* highways is an offence in the nature of a non-feazance, the principal enquiry upon this subject will be as to the persons who are liable to be called upon to keep them in repair.

The parish is of common right bound to repair highways within it.

The inhabitants of the parish at large are *primâ facie*, and of common right, bound to repair all highways lying within it, unless by prescription, or otherwise, they can throw the burden upon particular persons. (*e*) And to such an extent is this obligation, that if the inhabitants of a township bound by prescription to repair the roads within the township be expressly exempted, by the provisions of a road act, from the charge of repairing new roads to be made within the township, that charge must necessarily fall upon the rest of the parish. (*f*) And upon the same principle it was holden that if particular persons were made chargeable to the repair of such highways by a statute lately made, and became insolvent, the justices of peace might put that charge upon the rest of the inhabitants. (*g*) And where a

(*d*) Rex *v.* Jones, 3 Camph. 230.

(*e*) 1 Hawk. P. C. c. 76. s. 5, 6, 7, 8. Austin's case, 1 Vent. 189. Anon. 1 Lord Raym. 725.

(*f*) Rex *v.* the Inhabitants of Sheffield, 2 T. R. 106.

(*g*) Anon. 1 Lord Raym. 725.

statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held that the inhabitants of the parish were not exempted from their common law liability to keep that street in repair; that the duty of repairing might be imposed upon others, and the parish be still liable; and that the parish were under the obligation, in the first instance, of seeing that the street was properly paved, and might seek a remedy over against the commissioners. (*h*) No *agreement* can exonerate a parish from the common law liability to repair; and a count in an indictment against the corporation of *Liverpool* stating that they were liable to repair a highway, *by virtue of a certain agreement* with the owners of houses alongside of it, was held to be bad; on the ground that the inhabitants of the parish, who are primâ facie bound to the repair of all highways within their boundaries, cannot be discharged from such liability by any *agreement* with others. (*i*)

Formerly it was held that if a parish lay in two counties, the inhabitants of *that part* of the parish in which the road charged to be out of repair lay were bound to repair it, and not the inhabitants of the whole parish. (*k*) But it has been more recently decided that if part of a parish be situate in one county and the rest in another, and a highway lying in one part be out of repair, an indictment against the inhabitants of *that part only* is bad: and that in such case the indictment must be against the whole parish. (*l*) And it appears to have been always considered that the indict-

(*h*) Rex *v.* the Inhabitants of St. George, Hanover Square, 3 Camph. 222.

(*i*) Rex *v.* the Mayor, &c. of Liverpool, 3 East. 86. And see 3 Bac. Abr. *Highways* (F).

(*k*) Rex *v.* the Inhabitants of Weston, 4 Burr. 2507.

(*l*) Rex *v.* the Inhabitants of Clifton, 5 T. R. 498.

ment under such circumstances must be preferred in that county wherein the ruinous part of the road lies. (*m*)

Repair of highways divided and allotted by justices on account of the boundaries of parishes being in the middle of them.

The statute 34 Geo. III. c. 64. which, when the boundaries of parishes are in the middle of highways, gives two justices power to divide such highways by a transverse line, has been already noticed. (*n*) The object of that statute was to facilitate the repairing of a highway so situated; and it enacts that the justices may order that the whole of such highway, on both sides, in one of such parts, shall be repaired by one of such parishes; and that the whole of such highway, on both sides, in the other of such parts, shall be repaired by the other of such parishes: and that they shall cause their order and a plan of the highway to be filed with the clerk of the peace. It then enacts "that after such "order and plan shall be so filed with the clerk of the "peace as aforesaid, such parishes, and the inhabitants "thereof respectively, shall be bound, as of common right, "to maintain and keep in repair such parts of such com- "mon highway so allotted to them as aforesaid, and shall "be liable to be prosecuted and indicted for neglect of such "duty, and shall in all respects whatsoever be liable and "subject to all the provisions, regulations, and penalties, "contained in any act or acts of parliament, for the repair "of the highways which are or shall be in force, in like "manner as they are liable and subject to with respect to "the repair of any other common highway within such

(*m*) Rex *v.* the Inhabitants of Clifton, 5 T. R. 498. and Rex *v.* Weston, *ante*, note (*k*). In Rex *v.* Clifton, Lord Kenyon, C. J. in answer to one of the supposed difficulties of this mode of proceeding said, "on an indictment against "a parish for not repairing a road, "it is not necessary for the pro- "secutor to serve every individual "in the parish with process: he "may compel the appearance of "any two, who live within the "county, upon whom the whole "fine may be levied: and the rest "of the inhabitants must re-im- "burse those two under the ge- "neral highway act." (13 Geo. III. c. 78. s. 47).

(*n*) *Ante*, 459, 460.

"parishes respectively; and also shall be discharged from "the repair of such parts of such highway as shall not be "included in their respective allotments." (*o*) It is further enacted that the statute shall not affect or alter the boundaries of counties, lordships, &c. nor any other division of public or private property, nor the boundaries of parishes, otherwise than for the purpose of repairing such particular portion of the highways. (*p*) And also that it shall not relate to highways repairable by any bodies politic or corporate, township, &c. or by a private person; but in case such bodies politic, &c. shall be desirous to be placed under its regulations, and the parties bound to the repair of the other side of the highway consent, two justices may make an order for the purpose. (*q*) In a case where a road lay in two parishes, and no division and allotment under this statute had been made, it was held that an indictment against one of the parishes, for not repairing one side of the road, ought to have stated that the parish was liable to repair *ad filum viæ:* and it seems that in such case it is not sufficient to aver that a certain part of the road (setting out the length and one half of the breadth) is out of repair, and that the inhabitants, &c. ought to repair it. (*r*)

Exceptions to an indictment; that it is no offence for highways to be dirty, and that the parish is not bound to *widen* a highway.

Exceptions were taken to an indictment, for suffering a highway to be very muddy, and so narrow that people could not pass without danger of their lives: first, that it is no offence for a highway to be dirty in winter; and, secondly, that the parish had no power to widen it, as there was a particular power vested by act of parliament in justices of the peace to do so. The indictment was held bad for want of saying that the way was out of repair; and one of the judges observed, that saying that the way was so *narrow* that the people could not pass was repugnant to its being

(*o*) S. 2.
(*p*) S. 4.
(*q*) S. 5.
(*r*) Rex v. the Inhabitants of St. Pancras, Peake R. 219.

" the king's highway;" for that if it had been so narrow, the people could never have passed there time out of mind. (*s*)

Particular subdivisions of a parish or particular individuals may be liable to repair highways.

But though the parish is bound primâ facie and of common right to repair the highways within it, yet a particular subdivision of a parish, or particular individuals, may be liable to relieve them from that *onus*, by reason of prescription, or the inclosure of the land in which the highway lies.

Thus the inhabitants of a district, township, or other division of a parish, and also particular individuals, may be bound to repair a highway by *prescription;* and it is said, that a corporation aggregate may be charged by a general prescription that it ought and hath used to do it, without shewing that it used to do so in respect of the tenure of certain lands, or for any other consideration; because such a corporation never dies, and therefore, if it were ever bound to such a duty, it must continue to be so; neither is it any plea that the corporation have done it out of charity. (*t*) But it is said, that such a general prescription is not sufficient to charge a private person; because no man is bound to do a thing which his ancestors have done, unless it be for some special reason; as having lands descended to him holden by such service, &c. (*u*) It may be observed that, where the origin of a way is accounted for, the prescription is destroyed. (*w*)

Each of several persons, being grantees of lands bound to repair, is liable to the whole charge.

Where lands bound to the repair of a bridge or highway *ratione tenuræ* are conveyed to several persons, every one of the grantees, being a tenant of any parcel, is liable to the whole charge, and must have contribution from the others. So where a manor so bound is conveyed to several persons,

(*s*) Reg. *v.* the Inhabitants of Stretford, 2 Lord Raym. 1169.

(*t*) 1 Hawk. P. C. c. 76. s. 8. 3 Bac. Abr. *Highways* (F).

(*u*) *Id. Ibid.*

(*w*) Rex *v.* Hudson, 2 Str. 909.

a tenant of any parcel, either of the demesnes or services, is liable to the whole repair, and may call upon the tenants of the residue to contribute; and the grantees are chargeable with the repair, though the grantor should convey the lands or manor discharged of the repair; and the grantees must have their remedy against the grantor. And the reason seems to be, because the whole manor or land, and every part thereof, in the possession of one tenant, being once chargeable with the repair, it shall remain so, notwithstanding any act of the owner. For the law will not suffer him to apportion the charge, and so make the remedy for the public benefit more difficult; or, by alienations to insolvent persons, to render the remedy against such persons quite frustrate. And though such lands or manor come into the hands of the crown, yet the obligation or duty continues; and any person afterwards claiming the whole, or any part of it, under the crown, will be liable to an indictment for not repairing. (*x*)

Of the liability to repair by reason of inclosure.

As an *inclosure* of a highway takes away the liberty and convenience which the public have of going upon the adjoining lands when the highway is out of repair, (*y*) it has been holden, that if the owner of lands not inclosed next adjoining to a highway incloses his lands on both sides, he is bound to make a *perfect good way* as long as the inclosure lasts; and is not excused by shewing that he has made the way as good as it was at the time of the inclosure; because, if it was then defective, the public might have gone upon the adjoining land. (*z*) So if a man incloses land on one side, which has been anciently enclosed on the other side, he ought to repair all the way; but if there is no such ancient inclosure on the

(*x*) Note (9) to Rex *v.* Stoughton, 2 Saund. 159. citing Reg. *v.* Duchess of Buccleugh. 1 Salk. 358. 3 Viner *Apportionment*, 5. pl. 9.

(*y*) *Ante*, 460.

(*z*) 1 Roll. Abr. 390. (B) pl. 1. Duncombe's case, Cro. Car. 366. Henn's case, Sir W. Jones, 296. Sty. 364. 2 Lord Raym. 1170. 1 Hawk. P. C. c. 76. s. 6. 3 Bac. Abr. *Highways* (F). Rex *v.* Stoughton, 2 Saund. 160. note (12).

other side, he ought to repair but half the way: thus, if there be an old hedge, time out of mind, belonging to A. on the one side of the way, and B. having land lying on the other side, make a new hedge, there B. shall be charged with the whole repair; but if A. make a hedge on the one side of the way, and B. on the other, they shall be chargeable by moieties. (*a*) But a person, having made himself liable to repair a highway by reason of inclosure, may relieve himself from the burthen of any further reparations by throwing it open again. (*b*) Thus it was ruled that if a person remove an encroachment, and leave that part of the road which was injured by the encroachment in a perfect state, his liability to repair *ratione coarctationis* ceases. (*c*) But it was held, in the same case, that if a person charged *ratione tenuræ* pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant for twenty-five years since the removal of the alleged encroachment; this is presumptive evidence that the defendant repaired ratione tenuræ generally, and renders it necessary for him to shew the time when the encroachment was made. (*d*) Where a road has been so inclosed, and it is insufficient, any passenger may break down the inclosure, and go over the adjoining land. (*e*)

Repairs of a road made in pursuance of a writ of *ad quod damnum*.

Where a new road is made in pursuance of a writ of *ad quod damnum*, the owner of the land is not obliged to repair the new road, unless the jury impose such a condition upon him: but the parishioners ought to keep it in repair for the future; because, being discharged from repairing the old

(*a*) 3 Bac. Abr. *Highways* (F). Rex *v.* Staughton, 1 Sid. 464. 1 Hawk. P. C. c. 76. s. 7. Rex *v.* Stoughton, 2 Saund. 161. note (12).

(*b*) 3 Bac. Abr. *Ibid.* Rex *v.* Flecknow, 1 Burr. 465. 1 Hawk. P. C. c. 76. s. 7. But where the party is charged with the repairing *ratione tenuræ*, he will be still bound to repair, though he lay the ground open to the highway. 3 Salk. 392.

(*c*) Rex *v.* Skinner, 5 Esp. 219.

(*d*) *Id. Ibid.*

(*e*) 3 Salk. 182.

road, no new burden is laid upon them, but their labour is only transposed from one place to another. But if the new road lie in another parish, then the person who sued out the writ and his heirs ought not only to make it, but to keep it in repair: otherwise the parishioners of such other parish would have a new charge upon them, and no recompence, by the former road being taken away. (*f*) Where a highway is inclosed under the authority of an act of parliament for dividing and inclosing open common fields, the person who incloses is not bound to repair it. (*g*)

13 Geo. III. c. 84. s. 62. Trustees of turnpike roads may agree with persons liable to repair any part of such roads by tenure concerning the future repair of them.

The general turnpike act 13 Geo. III. c. 84. s. 62. reciting that, whereas many persons are liable by tenure, inclosure, or otherwise, to the repair of certain highways, which, having become turnpike roads, are more used and occasion an increase of the expense of repairing, which ought in some degree to be laid upon such turnpike road, enacts, that the trustees of the turnpike road may agree with the persons liable to repair such highway for the repair thereof; and may contribute so much to the repair, out of the tolls or statute duty, as they shall think just and reasonable. Section 63 also enacts, that where parts of highways or turnpike roads are turned by legal authority, to make the same nearer or more commodious, the inhabitants or other persons, who were liable to the repair of the old highway, shall be liable to the repair of the new, or so much thereof as shall be equal to the burthen and expense of repairing such old highway from which they are exonerated by so turning the same. And if the several parties interested cannot agree, two justices are to view and settle the same: and if it shall be found more convenient to fix a gross sum or annual sum, to be paid by the inhabitants or other such persons towards the repair of the new highway, instead of fixing the part or proportion of such new highway to be

And where roads are turned, the persons liable to the repair of the old roads are to be liable to the repair of the new roads, or of certain proportions of them.

(*f*) Ex parte Vennor, 3 Atk. 771, 2. 1 Hawk. P. C. c. 76. s. 7. 74, 75.

(*g*) Rex *v.* Flecknow, 1 Burr. 465.

repaired by them, the said justices may, with the consent of such person or persons, and of the inhabitants, obtained at a vestry meeting for that purpose, and also of the trustees, at a public meeting, if it be a turnpike road, order and direct the same accordingly.

Statutes 13 Geo. III. c. 78. and 84. and other statutes, relating to the repairing of highways and turnpike roads.

The general statutes, making provision for repairing the highways and turnpike roads, were repealed and reduced into two acts; namely, the 13 Geo. III. c. 78. and the 13 Geo. III. c. 84. the former of which relates to highways, (*h*) and the latter to turnpike roads: and there are also inclosure acts and other statutes, both of a public and private nature, which relate to the repairs and management of the roads in particular places and districts. But these acts, and especially the general statutes, are of great length, and branch out into a variety of clauses, a detail of which would not be consistent with the proposed limits of this work. It may, however, be useful to notice a few of the decided points which relate to their construction.

The statutes do not abrogate the common law provisions.

It is no excuse for parishioners, being indicted at common law for not repairing the highways, that they have done their full work required by statute; for the statutes, being made in the affirmative, do not abrogate any provision of this kind by the common law. (*i*)

Trustees under a road act not obliged to repair fences.

If trustees under a road act turn a road through an inclosure, and make the fences at their own expence, and repair them for several years, they cannot be compelled to continue such repairs, unless there be a special provision in the act to that effect. (*k*) In this case it was considered, that what is meant by a road is the surface over which the king's subjects

(*h*) Some of its provisions and enactments have received alterations from time to time by different statutes; amongst others by 34 Geo. III. c. 64. *ante*, 459. 34 Geo. III. c. 74. 44 Geo. III. c. 52. 54 Geo. III. c. 109. and 55 Geo. III. c. 68. *Ante*, 455. *et sequ.*

(*i*) 1 Hawk. P. C. c. 76. s. 43. 3 Bac. Abr. *Highways* (G).

(*k*) Rex *v.* the Com. of the Llandilo District, 2 T. R. 232.

have a right to pass, and not the fences on each side: and that the owners of the land are bound to répair the fences on each side, unless otherwise provided by the act. (*l*)

Construction of a turnpike act.—*Excluding* the repairs of a road in a town.

It has been held that a turnpike act, giving directions for repairing the road *to* and *from* a town, *excludes* the town. (*m*) In the case upon which the decision was made it was stated, that the town had, lately before the act was passed, been *paved* by the inhabitants, and that it was kept in repair by them, and was then so: and in several parts of the act the roads were described as leading from, to, and *through*, particular towns; but when it mentioned the town in question, it only said *to* and *from* the town, omitting the word "*through*." (*n*)

Commissioners under an inclosure act not empowered to throw the repair of private roads on the parish.

The commissioners appointed by the 6 Geo. III. c. 78. (an act for dividing and inclosing certain lands in the parish of Cottingham) which enacted, that the public roads to be set out by them should be repaired in such manner as other public roads are by law to be repaired, and that the private roads should be repaired by *such person or persons* as they should award, have no power to impose on the parish at large the burden of repairing any of the private roads set out in pursuance of the act. (*o*)

Award under an inclosure act rejected as evidence of locality of a highway, the usage not having been pursuant to it, nor the proper notices proved.

Upon an indictment against the parish of *Haslingfield*, for not repairing a highway, an award made by commissioners under an inclosure act, which awarded the highway to be in a different parish, was holden not to be admissible evidence for the defendants, without shewing that the commissioners had given notices which the act required to be given previously to the boundaries having been ascertained by them; it appearing that the usage had not been pursuant to

(*l*) Rex *v.* the Com. of the Llandilo District, 2 T. R. 232.

(*m*) Hammond *v.* Brewer, 1 Burr. R. 376.

(*n*) *Id. Ibid.* and see Rex *v.* Gamlingay, 1 Leach 528. and Rex *v.* Harrow, 1 Burr. 2091.

(*o*) Rex *v.* the Inhabitants of Cottingham, 6 T. R. 20.

the award; the defendants having since the award, as well as before, repaired the highway. The learned judge who tried this case reported that he should have had no difficulty in admitting the award, and, if the usage had been pursuant to it, presuming that the proper notices had been given. (*p*)

We may now shortly consider the modes of proceeding by which persons guilty of these nuisances to highways may be prosecuted.

Proceedings against parties guilty of nuisances in highways, by indictment, presentment, or information.

Nuisances or annoyances to highways, whether positive, in the nature of actual obstructions, or negative, by the defect of proper reparations, may be made the subject of indictment, which is the more usual course of proceeding. And the 13 Geo. III. c. 78. s. 24. enacts, that "every justice of assize, justices of the counties palatine of Chester, Lancaster, and Durham, and of the great sessions in Wales, shall have authority, by this statute, upon his or their own view, and every justice of the peace, either upon his own view, or upon information upon oath to him given by any surveyor of the highways, to make *presentment*, at their respective assizes, or great sessions, or in the open general quarter sessions, of such respective limit, of any highway, causeway, or bridge, not well and sufficiently repaired and amended, or of any other default or offence committed and done contrary to the provision and intent of this statute; and that all defects in the repair thereof shall be presented in such jurisdiction where the same do lie, and not elsewhere; and that no such presentment, nor any indictment for any such default or offence, shall be removed by *certiorari*, or otherwise, out of such jurisdiction, till such indictment or presentment be traversed, and judgment thereupon given, except where the duty or obligation of repairing the said

Presentment to be in the jurisdiction where the nuisance is. And no presentment or indictment to be removed by certiorari.

(*p*) Rex *v.* the Inhabitants of Haslingfield, 2 M. and S. 558.

" highways, causeways, or bridges, may come in question;
" and that every such presentment made by any such justice
" of assize, counties palatine, great sessions, or of the peace,
" upon his own view, or upon such information having been
" given to such justice of the peace upon the oath of such
" surveyor of the highways, as aforesaid, shall be as good,
" and of the same force, strength, and effect, in the law,
" as if the same had been presented and found by the oaths
Fines may be assessed upon such presentment. " of twelve men; and that for every such default or offence
" so presented, as aforesaid, the justices of assize, counties
" palatine, and great sessions, at their respective courts, and
" the justices of the peace, at their general quarter sessions,
" shall have authority to assess such *fines* as to them shall
Right of traverse saved in case of presentment. " be thought meet: saving to every person and persons
" that shall be affected by any such presentment, his, her,
" or their lawful traverse to the same presentment, as well
" with respect to the fact of non-repair as to the duty or
" obligation of repairing the said highways, as they might
" have had upon any indictment of the same presented and
Expences of prosecution upon such presentments. " found by a grand jury; and the justices of the peace, at
" their general quarter sessions, or the major part of them,
" may, if they see just cause, direct the prosecutions upon
" such presentments as shall be made at the quarter sessions
" as aforesaid to be carried on at *the general expence* of
" such limit, and to be paid out of the general rates within
" the same."

Information. Another mode of proceeding is by *information*, which may be granted by the court of King's Bench at their discretion. But they will not grant an information to compel a parish to repair a highway, which is not much used; and when it appears that another highway, equally convenient to the public, is in good repair. And indeed they never give leave to file an information for not repairing a highway, unless it appear that the grand jury have been guilty of gross misbehaviour in not finding a bill; and they refuse it for this reason that the fine set on conviction upon

an information cannot be expended in the repair of the highway; whereas on an indictment it is always so expended. (*q*)

Of the form of an indictment or presentment. (*r*)

Though it is often stated in indictments or presentments for nuisances to highways, that "from time whereof the "memory of man is not to the contrary," or "from time "immemorial," there was and is a common and ancient king's highway, yet it is not necessary to do so; for it is sufficient to state in a compendious manner *that it is a highway*. (*s*) But the highway must be alleged in the presentment or indictment to lie in the parish indicted, otherwise it is not bound to repair it; and if it be not so alleged, the indictment or presentment is erroneous, and judgment will be reversed. (*t*) Where the indictment is against a particular person, charging him with the repair of a highway in respect of certain lands, it seems that the occupier, and not the owner, is the proper person against whom the indictment should be brought; on the ground that the public have no means of knowing who is the *owner* of the lands charged with the repair: and it does not seem to be material what estate the occupier has in the lands liable. (*u*) The averment of obligation to repair, in an indictment against a person for not repairing *by reason of tenure*, will, it seems, be sufficient, if it state that the defendant ought to repair, *by reason of the tenure of his lands*, without adding that those who held the lands for the time being have *imme-*

(*q*) 3 Bac. Abr. *Highways* (H). Rex *v.* the Inhabitants of Steyning, Say. 92.

(*r*) It is not within the scope of this work to treat particularly of the forms of the pleadings, though some of the prominent points concerning them are occasionally mentioned. For indictments, pleas, &c. relating to nuisances to highways, the reader is referred to the Cro. Circ. Comp. (8th ed.) 301. 6 Wentw. 405. 2 Starkie 604. 3 Chit. Crim. L. 576. 607. and the notes to Rex *v.* Stoughton, 2 Saund. 157, *et sequ.*

(*s*) Aspindall *v.* Brown, 3 T. R. 265.

(*t*) Rex *v.* Hartford, Cowp. 111.

(*u*) Reg. *v.* Watts, 1 Salk. 357. Reg. *v.* Bucknell, 7 Mod. 55.

morially repaired: a prescription being implied in the estate of inheritance in the land. (*w*) But an indictment against *a particular part of a parish*, such as a district, township, division, or the like, for not repairing a highway in the parish, stating that the inhabitants of the district from time immemorial *ought to repair and amend it*, is erroneous; it should state that the inhabitants of such district from time whereof, &c. *have used and been accustomed*, and of right ought to repair and amend it: for the inhabitants of a particular division of a parish, not being bound to repair by common law, and their obligation arising necessarily only from custom or prescription, the indictment ought to shew such custom, prescription, or reason, of their obligation. (*x*) So it has been decided that a presentment under the statute 13 Geo. III. c. 78. s. 24. against a smaller district than a parish, must state expressly *how* the inhabitants thereof are liable to the repair of the roads. (*y*) A material variance from the description of the road in the indictment will be fatal: and it was ruled that a highway leading from A. to B. and communicating with C. by a cross road, cannot be described as a highway leading from A. to C. and from thence to B. (*z*) In every indictment against a parish for not repairing a highway, there are three essential averments: the first, that the road is a highway; the second, that it is out of repair, and the third, that it is situated in the parish. (*a*)

Of the defence under the general issue, and of the necessity for a special plea.

It was ruled in a late case, that if the description of a highway in an indictment for the non-repair of it be too indefinite, being equally applicable to several highways, advantage should be taken by plea in abatement; and that

(*w*) Rex *v.* Stoughton, 2 Saund. 158. d. note (9).

(*x*) *Id. Ibid.* Rex *v.* Broughton, 5 Burr. 2700. Freem. 522. Rex *v.* Sheffield, 2 T. R. 111.

(*y*) Rex *v.* Penderryn, 2 T. R. 513. Rex *v.* Marton, Andr. 276.

(*z*) Rex *v.* Great Canfield, 6 Esp. 136.

(*a*) 2 Starkie Crim. Plead. 667, note (*f*).

the description given, if true in fact, cannot be objected to at the trial under the plea of the general issue. (*b*)

Where an indictment or presentment is against the inhabitants of a parish at large, who, as it has been seen, are bound of common right to repair all the highways lying within it, they may upon the general issue, *not guilty*, shew that the highway is in repair, or that it is not a highway, or that it does not lie within the parish; for all these are facts which the prosecutor must allege in his indictment, and prove on the plea of not guilty. (*c*) But it is settled that they cannot, upon the general issue, throw the burden of repairing on particular persons, by prescription, or otherwise; but must set forth their discharge in a special plea. (*d*) This rule, however, was recently held not to apply to a case where the burthen of repairing was transferred from the inhabitants of a parish to other persons by a public act of parliament, to which all are supposed to be privy, and of which all are supposed to have cognizance. (*e*) Where a person is charged with the repairs of a highway, or bridge, *against common right*, he may discharge himself upon *not guilty* to the indictment: and therefore where a particular division of a parish is charged with the repair by prescription, or a particular person by reason of tenure or the like, which are obligations against the common law, they may throw the burthen either on the parish, or even on an individual, on the general issue. And the reason seems to be, because upon this issue the prosecutor is bound to prove that the defendants are chargeable by tenure or prescription, and therefore the defendants may disprove it by opposite evidence: but if they will, though unnecessarily, plead the special matter, it is held not to be enough to say that they ought

(*b*) Rex *v.* Hammersmith, 1 Starkie R. 357.

(*c*) Rex *v.* the Inhabitants of Norwich, 1 Str. 181, *et sequ.* Rex *v.* Stoughton, 2 Saund. 158. note 3.

(*d*) Rex *v.* St. Andrews, 1 Mod. 112. Anon. 1 Vent. 256.

(*e*) Rex *v.* the Inhabitants of St. George, 3 Campb. 222.

not to repair, but they must go further and shew *who ought.* (*f*)

Traverse of obligation to repair.

If a person indicted for not repairing *ratione tenuræ*, or a township, or other particular persons, for not repairing by prescription, plead (though unnecessarily) to the indictment, and shew who ought to repair, as they must do, it is necessary to traverse their obligation to repair; but if a parish is indicted for not repairing a highway, or a county for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair, for it is a traverse of matter of law; and such traverse, though very often inserted, is demurrable to, and therefore ought always to be omitted. (g)

Where a parish is indicted, and a subdivision of such parish is liable to the repair, the parish must take care to plead such liability.

Where any subdivision of a parish is liable to the repair of a highway, and the indictment is, notwithstanding, preferred against the whole parish, care should be taken to plead the liability of such subdivision; for if judgment be given against the parish, whether after verdict upon not guilty, or by default, the judgment will be conclusive evidence of the liability of the *whole parish* to repair, unless *fraud* can be shewn. (*h*) Fraud, however, is only put for example; for if the other districts can shew that they had *no notice* of the indictment, and that the defence was made and conducted entirely by the district in which the highway indicted lay, without their knowledge or privity, the court will consider it as being substantially an indictment against that district, and give the other districts leave to plead the prescription to a subsequent indictment for not repairing the highways in that parish. (*i*) And in a late case of an

(*f*) Rex *v.* Yarnton, 1 Sid. 140. Rex *v.* Hornsey, Carth 213. Rex *v.* City of Norwich, 1 Str. 180, *et sequ.* Rex *v.* St. Andrews, 3 Salk. 183. pl. 3. Rex *v.* Stoughton, 2 Saund. 159. a. note (10).

(*g*) Rex *v.* Stoughton, 2 Saund. 159. c. note (10). Bennet *v.* Filkins, 1 Saund. 23. note (5).

(*h*) Rex *v.* St. Pancras, Peake R. 219.

(*i*) Rex *v.* Stoughton, 2 Saund. 159. c. note (10). Rex *v.* Townsend, Dougl. 421.

indictment for not repairing a highway against the parish of *Eardisland*, consisting of three townships, *Eardisland*, *Burton*, and *Hardwicke*, where there was a plea on the part of the township of *Burton*, that each of the three townships had immemorially repaired its own highways separately; it was held, that the records of indictments against the parish generally for not repairing highways situate in the township of *Eardisland*, and the township of *Hardwicke*, with general pleas of *not guilty*, and convictions thereupon, were *primâ facie* evidence to disprove the custom for each township to repair separately; but that evidence was admissible to shew that these pleas of *not guilty* were pleaded only by the inhabitants of the townships of *Eardisland* and *Hardwicke* without the privity of *Burton*. (*t*) In a case where the inhabitants of a parish pleaded that the inhabitants of a particular district were bound by prescription to repair all common highways situate within that district, save and except one common highway within the said district, it was holden that the plea might be supported, although it appeared that the excepted highway was of recent date; and it was also holden that in such a plea it was not necessary to state by whom the excepted highway was repairable. (*u*)

Record of an *acquittal* is not evidence to shew that the parish is not liable to repair.

It has been held that the record of an *acquittal* upon an indictment for not repairing a highway, is not evidence to shew that the parish is *not liable;* on the ground that some other parties might have indicted them, and that those parties could not be bound by this record. (*w*) And a satisfactory reason for rejecting such evidence altogether seems to be that the acquittal might have proceeded upon the want of proof that the road was out of repair. (*x*) In the case of an indictment for not repairing a highway, which it was alleged the defendant was bound to repair *ratione tenuræ*,

(*t*) Rex *v.* Eardisland, 2 Campb. 494.

(*u*) Rex *v.* Ecclesfield, 1 Starkie R. 393.

(*w*) Rex *v.* St. Pancras, Peake R. 219.

(*x*) Mann. Ind. N. P. R. 128.

it was held that an award made under a submission by a former tenant for years of the premises, could neither be received as an adjudication, the tenant having no authority to bind the rights of his landlord, nor as evidence of reputation, being *post litem motam*. (*y*)

13 G. III. c. 78. s. 68. Surveyor to be a competent witness, and also an inhabitant of any parish, &c. in certain cases.

The general highway act 13 Geo. III. c. 78. s. 68. enacts that the surveyor of any parish or place shall be deemed a competent witness in all matters relative to the execution of the act, notwithstanding his salary may arise in part from the forfeitures and penalties thereby inflicted. And a subsequent section further enacts, that no conviction shall be had by virtue of that act, unless upon confession of the party accused, or upon the oath of one or more credible witnesses, or upon the view of a justice; and that any inhabitant of any parish or place, in which any offence shall be committed contrary to the act, shall be deemed a competent witness.

The prosecutor may, it seems, be a witness for the prosecution.

In a late case of an indictment for not repairing a highway, the prosecutor was examined as a witness for the prosecution, and no objection was taken to his competency: (*z*) and it seems that a prosecutor in such case is a competent witness; for, though the court is authorized to award costs against him in case the proceeding shall appear to have been vexatious, (*a*) yet the court would scarcely presume, in the first instance, that the prosecutor's conduct had been vexatious, so as to raise an objection to his competency; especially after the finding of a bill by the grand jury. (*b*)

(*y*) Rex *v.* Cotton, 3 Camph. 444, *cor.* Dampier, J. *Stafford* Sum. Ass. 1813. The learned judge stated that it was a question of considerable importance, and of some novelty; and wished that his opinion upon it could be reviewed: but, from the manner in which the question arose, that was not possible.

(*z*) Rex *v.* Hammersmith, 1 Starkie R. 357.

(*a*) By the 13 Geo. III. c. 78. s. 64. *post*, 487.

(*b*) Rex *v.* Hammersmith, 1 Starkie R. 358, note (*a*).

Though the same statute of Geo. III. by s. 24. declares, as we have seen, (*c*) that no presentments or indictments therein mentioned shall be removed by *certiorari* before traverse and judgment, except where the obligation of repairing may come in question, yet this clause does not take away the writ at the instance of the prosecutor; for the crown does not traverse; and it was calculated merely to prevent delay on the part of defendants. (*d*) And it has been holden to be no objection to a *certiorari* to remove such a presentment, that it is prosecuted by another than the justice presenting, if it be by his consent. (*e*) The 5 W. & M. c. 11. s. 6. also provides that if any indictment or presentment be against any persons for not repairing highways, or bridges, and the right or title to repair the same may come in question, upon a suggestion and affidavit made of the truth thereof, a *certiorari* may be granted, provided that the party prosecuting such certiorari enter into the recognizance mentioned in the act. In a late case it was held that, upon an indictment against a parish for not repairing a highway, the right to repair may come in question so as to entitle the parish to remove it by certiorari, though the parish plead not guilty only, it being stated in an affidavit filed by the defendants, that, on the trial of the indictment, the question, whether the parish were liable to repair, and the right to repair, would come in issue. (*f*) And in a more ancient case it was decided that the prosecutor may remove an indictment by certiorari, though there be no affidavit made, nor recognizance given according to the statute. (*g*) Certiorari.

The general rule of a new trial never being allowed A new trial is not allowed

(*c*) *Ante*, 475. And by s. 80. of this statute it is further enacted, that no proceedings had in pursuance of the act shall be quashed or vacated for want of form, or removed by certiorari, or any other writ or process, except as therein before mentioned.

(*d*) Rex *v.* Bodenham, Cowp. 78.

(*e*) Rex *v.* Penderryn, 2 T. R. 260.

(*f*) Rex *v.* Taunton, St. Mary, 3 M. & S. 465.

(*g*) Rex *v.* Farewell, 2 Str. 1209.

after a conviction.

where the defendant is acquitted in a criminal case has been held to prevail in a prosecution for not repairing a highway, though such prosecution is usually carried on for the purpose of trying or enforcing a civil liability. (*h*) But if the defendants be found guilty, and the justice of the case seem to require it, the court would probably grant a new trial, or stay the judgment upon payment of costs, until another indictment be preferred for the purpose of trying the question of liability to repair. (*i*)

Of the judgment.

The object of prosecutions for nuisances to highways is to effect either a removal of the nuisance in cases of obstruction, or the repair of the highway in cases where the nuisance charged is the want of reparation. The judgment of the court is usually a fine, and an order on the defendant at his own costs to abate the nuisance in the one case, (*k*) and in the other a fine, for the purpose of obliging the defendants to repair the nuisance: for they will not be discharged by submitting to a fine, but a distringas will go *ad infinitum* until they repair. (*l*) But in order to warrant a judgment

(*h*) Rex *v.* Silverton, 1 Wils. 298. cited 2 Salk. 646. in the note. Rex *v.* Mann, 4 M. & S. 337. Rex *v.* Cohen and Jacob, 1 Starkie R. 516. and see Rex *v.* Reynell, 6 East. 315. and the cases there cited. See *ante*, 481. that the record of acquittal is not evidence to shew that the parish is *not liable* to repair.

(*i*) The judgment was so stayed in a case where the liability to repair a county bridge was in question. Rex *v.* the Inhabitants of Oxfordshire, 16 East. 223. It was said by Lord Kenyon, C. J. in Rex *v.* Mawbey and others, 6 T. R. 619.—"In misdemeanors there is "no authority to shew that we "cannot grant a new trial in "order that the guilt or innocence of those who have been "*convicted* may be again examined into." It may be observed also that, in cases of indictments for misdemeanors, the court will, in its discretion, save the point for consideration, giving the defendant an opportunity, in case he shall be convicted, to move to have an acquittal entered. Rex *v.* Gash and another, 1 Starkie R. 445.

(*k*) Rex *v.* Pappineau, 1 Str. 686. 1 Hawk. P. C. c. 75. s. 15.

(*l*) Rex *v.* Cluworth, 1 Salk. 358. 6 Mod. 163. 1 Hawk. P. C. c. 76. s. 249.

for abating the nuisance, it must be stated in the indictment to be *continuing;* as otherwise such a judgment would be absurd. (*m*) And if the court be satisfied that the nuisance is effectually abated before judgment is prayed upon the indictment, they will not in their discretion give judgment to abate it. And though it was contended, on the authority of several cases, (*n*) that if the nuisance be of a permanent nature the regular judgment must be to abate it, the court refused to give such judgment upon an indictment for an obstruction in a public highway, where the highway, after the conviction of the defendant, was regularly turned by an order of magistrates, and a certificate was obtained of the new way being fit for the passage of the public, and the affidavits stated that so much of the old way indicted as was still retained was freed from all obstruction. (*o*)

Levying and application of fines.

The 13 Geo. III. c. 78. s. 47. enacts, that no fine, &c. for not repairing the highways, or not appearing to any indictment or presentment for not repairing the same, shall be returned into the court of exchequer, or other court, but shall be levied by and paid to such person or persons residing in or near the parish, township, or place, where the road shall lie, as the court imposing such fines, &c. shall order and direct, to be applied towards the repair and amendment of such highways; and the person or persons so ordered to receive such fine shall receive, apply, and ac-

(*m*) Rex *v.* Stead, 8 T. R. 142.

(*n*) Rex *v.* Pappineau, *ante*, note (*k*) Rex *v.* the Justices of Yorkshire, 7 T. R. 467. Rex *v.* Stead, *ante*, note (*m*), and other cases cited in those.

(*o*) Rex *v.* Incledon, 13 East. 164. Judgment was given that the defendant should pay a fine to the king of 6*s.* 8*d.* In Rex *v.* Sir Joseph Mawbey and others, 6 T. R. 619. it was held that a certificate by justices of the peace, that a highway indicted is in repair is a legal instrument recognized by the courts of law, and admissible in evidence after conviction when the court are about to impose a fine. In Rex *v.* Wingfield, 1 Blac. Rep. 602. where a person was convicted upon an indictment for not repairing a road *ratione tenuræ*, it was held that the court would not inflict a small fine, on a certificate of the road being repaired, until the prosecutor's costs were paid.

count, for the same, according to the direction of such court, or in default thereof shall forfeit double the sum received; and if any fine, &c. imposed on any such parish, &c. shall be levied on any one or more of the inhabitants of such parish, &c. then that such inhabitant or inhabitants may make his or their complaint to the justices at their special sessions, and the justices are authorized by warrant under their hands and seals to cause a rate to be made according to the form and manner thereinbefore prescribed for the reimbursing such inhabitant or inhabitants: and the rate so made and confirmed by any two justices is to be collected and levied by the surveyor of the parish, &c. indicted; and the surveyor is within a month after the making and confirming the rate to collect, levy, and pay, unto such inhabitant or inhabitants the money so levied on him or them as aforesaid. Upon the latter part of this section it has been held that the application for the rate to reimburse the inhabitants, on whom a fine has been levied, after a conviction upon an indictment against the parish for non-repair, ought to be made within a reasonable time after such levy, and before any material change of inhabitants; and the court of King's Bench refused a mandamus to the justices to make such rate after an interval of eight years; though applications had been made in the interval, from time to time, to the magistrates below, who had declined to make the rate on the ground that the parish at large had been improperly indicted and convicted, and though, so lately as the year before the application to the court of King's Bench, the magistrates had ordered an account to be taken of the quantum expended upon the repairs out of the money levied. (*p*)

Where turnpike roads are indicted the court may proportion the fine and

The 13 Geo. III. c. 84. s. 33. provides for a portion of the fine being paid by the turnpike trustees when the highway shall be a turnpike road; and enacts that, when the inhabitants of any parish, township, or place, shall be in-

(*p*) Rex v. the Justices of Lancashire, 12 East. 366.

dicted or presented for not repairing any highway, being turnpike road, and the court, before whom such indictment or presentment shall be preferred, shall impose a fine for the repair of such road, the same shall be proportioned, together with the costs and charges, between such inhabitants and the turnpike trustees as to the court shall seem just; and the court may order the treasurer of such turnpike road to pay the same out of the money then in his hands, or next to be received by him, in case it shall appear to such court, from the circumstances of such turnpike debts and revenues, that the same may be paid without endangering the security of the creditors who have advanced their money upon the credit of the tolls. The true construction of this section is, that the court which imposes the fine shall have power to apportion it between the parish and the trust; so that where an indictment was originally preferred at the assizes, and afterwards removed into the court of King's Bench by certiorari, it was held that the court of King's Bench might apportion the fine. (*q*)

costs between the inhabitants and the trustees.

The 13 Geo. III. c. 78. s. 64. enacts, "that it shall be "lawful for the court, before whom any indictment or pre- "sentment shall be tried for not repairing highways, to "award costs to the prosecutor, to be paid by the person or "persons so indicted or presented, if it shall appear to the "said court that the defence made to such indictment or "presentment was frivolous; or to award costs to the per- "son indicted or presented, to be paid by the prosecutor, if "it shall appear to the said court that such prosecution was "vexatious." It has been held that it is matter to be determined by inquiry whether a person is or is not the prosecutor within this section of the statute; and that a court of quarter sessions, before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may, by their order, award C. and E. to pay costs to the parish, although the names of C. and E. be not on the back of the

Upon the trial of an indictment or presentment the court may award costs.

(*q*) Rex *v.* Upper Papworth, 2 East. R. 413.

indictment, and although the indictment originated in a presentment of A. and B. constables, whose names are on the indictment: and it was also held to be enough if the order is entitled as in the prosecution of C. and E. without shewing further that C. and E. are prosecutors; and that it need not appear on the face of the order that the indictment was tried, if that appear by the record of the proceedings; and also that the order is good in form if it be for the payment of the costs to the solicitor of the parish. (*r*) The statute does not direct any certificate to be given in a precise form of words, in order to entitle the party to costs; therefore where the judge, on the trial of an indictment certified that the defence was frivolous, without also awarding costs in express terms, it was held that the prosecutor was entitled to costs. (*s*) But it has also been holden, in the construction of this section of the statute, upon an indictment, which had been removed into the court of King's Bench by certiorari and been sent down for trial to the assizes, where the defendants were acquitted for want of prosecution, that the court of King's Bench had no power to award costs to the defendants on the ground of the prosecution having been vexatious, but that the application ought to have been made to the judge at *Nisi Prius*. (*t*)

As to costs under 5 W. and M. c. 11 s. 3. where the defendant has removed the indictment by *certiorari*.

The 5 W. and M. c. 11. s. 3. (which has been already cited) enacts that if the defendant, prosecuting such writ of *certiorari* as is mentioned in that act, "be convicted of the "offence for which he was indicted, that then the court of "King's Bench shall give reasonable costs to the prosecutor "if he be the party grieved or injured, or be a justice of the "peace, mayor, bailiff, constable, &c. or any other civil "officer, who shall prosecute upon the account of any fact "committed or done that concerned him or them as officer "or officers to prosecute or present" to be taxed, &c. Upon

(*r*) Rex *v.* Commerell and Ellis, 4 M. and S. 203.

(*s*) Rex *v.* Clifton, 6 T. R. 344.

(*t*) Rex *v.* Chadderton, 5 T. R. 272.

this statute it has been held that a justice of the peace who *indicts* a road for being out of repair is entitled to his costs, after a removal of the indictment by certiorari, if the defendant be convicted. (*u*) But the prosecutor must shew himself to be the party grieved in order to obtain costs under this statute: therefore, in a case where he did not apply for the costs until two years after judgment given, and it did not appear that he had ever used the highway before it was stopped, and it was stated, that, while the highway was stopped, he had declared that he did not care about it, the court held that he was not entitled to costs as the party grieved, although the prosecution was at his instance and expence. (*x*) In a recent case, where this statute was considered as a remedial law, (*y*) it was held that several persons were entitled to costs under it as prosecutors of an indictment, removed by certiorari, for not repairing a highway; one, as constable of the manor within which the highway lay; the others, as parties grieved; they having used the way for many years in passing and repassing from their homes to the next market town, and being obliged, by reason of the want of repair, to take a more circuitous route. (*z*)

Payment of expences of carrying on or defending prosecutions agreed upon at a vestry or other public meeting.

Section 65 of the 13 Geo. III. c. 78. enacts, that if the inhabitants of any parish, township, or place, shall agree at a vestry, or other public meeting, to prosecute any person by indictment for not repairing any highway within such parish, township, or place, which they apprehend such person to be obliged by law to repair, or for committing any nuisance upon any highway, or shall agree at such vestry

(*u*) Rex *v.* Kettleworth, 5 T. R. 33.

(*x*) Rex *v.* Incledon, 1 M. and S. 268.

(*y*) By Lord Ellenborough, C. J. in conformity with the opinion of Lord Kenyon, C. J. in Rex *v.* Kettleworth, 5 T. R. 33. and contrary to the view taken of it by Buller, J. in Rex *v.* Sharpness, 2 T. R. 48. where that learned judge said, that the statute had always been construed as strictly as possible.

(*z*) Rex *v.* Taunton St. Mary, 3 M. and S. 465.

meeting to defend any indictment or presentment against them, the surveyor may charge in his account the reasonable expences thereof, after the same shall have been agreed to by such inhabitants at a vestry or public meeting, or allowed by a justice within the limit where such highway shall lie.

SECTION III.

OF NUISANCES TO PUBLIC RIVERS.

Rivers considered as highways.

In books of the best authority a *river* common to all men is called a highway: (*a*) and if it be considered as a highway, any obstructions, by which its course and the use of it as a highway by the king's subjects are impeded, will fall within the same principles as those which relate to public roads, and which have been considered in the preceding section of this chapter. But it should be observed that a learned judge appears to have considered a river as differing, in some respects, at least, from a highway, where he is reported to have said, "*Callis* compares a navigable river "to an highway: but no two cases can be more distinct. "In the latter case, if the way be foundrous and out of re- "pair, the public have a right to go on the adjoining land: "but if a river should happen to be choked up with mud, "that would not give the public a right to cut another "passage through the adjoining lands." (*b*) In the same case the court decided, that the public are not entitled at common law to tow on the banks of ancient navigable rivers. (*c*)

Where the course of a ri-

It has been before observed, that a highway may be changed by the act of God; and upon the same principle it

(*a*) 1 Hawk. P. C. c. 76. s. 1. citing 27 Ass. 23. Fitz. 279. 2 Com. Dig. 397. And see Anon. Loft, 556.

(*b*) By Buller, J. in Ball v. Herbert, 3 T. R. 263.

(*c*) Ball v. Herbert, 3 T. R. 253.

has been holden, that if a water, which has been an ancient highway, by degrees change its course, and go over different ground from that whereon it used to run, yet the highway continues in the new channel, in the same manner as in the old. (*d*) It has been held that the soil of a navigable river *primâ facie*, though not necessarily, belongs to the king; and is not by presumption of law in the owners of the adjoining lands. (*e*)

ver is changed, it is still a highway.

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before. (*f*) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party, as if it were not his, if thereby the passage of vessels is obstructed. (*g*) The placing a floating dock in a public river has been also held to be a nuisance, though beneficial in repairing ships: (*h*) and the bringing a great ship into *Billingsgate* dock, which, though a common dock, was common only for small ships coming with provisions to the markets in *London*, appears to have been considered as a nuisance, in the same manner as if a man were so to use a common pack and horse way with his cart, so as to plough it up, and thereby render it less convenient to riders. (*i*) And the erection of *weirs* across rivers was reprobated in the earliest periods of our law. "They were considered as public nui-" sances. The words of Magna Charta are, that all weirs " from henceforth shall be utterly pulled down by Thames

Obstructions in public rivers.

(*d*) 1 Hawk. P. C. c. 76. s. 4. 22 Ass. 93. 1 Roll. Abr. 390. 4 Vin. Ab. *Chimin* (A).

(*e*) Rex *v.* Smith, Dougl. 441.

(*f*) 1 Hawk. P. C. c. 75. s. 11.

(*g*) 5 Bac. Abr. *Nuis.* (A). where it is also said, "And hence it seems " to follow that private stairs, from " those houses that stand by the " *Thames*, into it, are common nui-" sances. But it seems that where " there are cuts made in the banks " that are not annoyances to the " river, the timber lying there is " no nuisance."

(*h*) Anon. *Surry* Ass. at *Kingston*, 1785, cited in the notes to 1 Hawk. P. C. c. 75. s. 11.

(*i*) Reg. *v.* Leech, 6 Mod. 145. 5 Bac. Abr. *Nuis.* (A).

" and Medway, and through all England, &c. And this " was followed up by subsequent acts treating them as pub- " lic nuisances, forbidding the erection of new ones, and the " enhancing, straitening, or enlarging, of those which had " aforetime existed." (*k*) Upon the principle, therefore, which has been before stated, (*l*) that the public have an interest in the suppression of public nuisances, though of long standing, it was held that a right to convert a brush-wood into a stone weir (whereby fish would be prevented from passing, except in flood times,) was not evidenced by shewing that forty years ago two-thirds of it had been so converted without interruption. (*m*)

Cases which have been held not to be obstructions.

By the 1 Eliz. c. 17. the taking of fish, except with the particular trammels or nets therein specified, was prohibited upon pain of the forfeiture of a certain penalty, of the fish taken, and also of the unlawful engines: and upon this act it was contended, that a party laying certain illegal engines called *bucks* in his own fishery was guilty of a nuisance; but the court held that it could not be considered as a nuisance public or private. (*n*) And it has been ruled that where a vessel has been sunk in a navigable river by accident and misfortune, no indictment can be maintained against the owner, for not removing it. (*o*) Lord Kenyon, C. J. said, that the grievance had been occasioned, not by any default or wilful misconduct of the defendant, but by accident and misfortune; and that it would be adding to the calamity to subject the party to an indictment for what had proceeded from causes against which he could not guard, or which he could not prevent: and though it was urged that if the defendant was not punishable for having caused the nuisance, yet it was his duty to have removed it, and that he was liable to be indicted for not having done so, the learned judge

(*k*) By Lord Ellenborough, C. J. in Weld *v.* Hornby, 7 East. 198, 199.

(*l*) *Ante*, 445.

(*m*) Weld *v.* Hornby, 7 East. 195.

(*n*) Bulbrooke *v.* Sir R. Goodere and others, 3 Burr. 1768.

(*o*) Rex *v.* Watts, 2 Esp. R. 675.

said, that perhaps the expence of removing the vessel might have amounted to more than the whole value of the property; and that he was therefore of opinion, that the offence charged was not the subject of indictment. (*p*)

Of the liability to clear the passage of a river, and of the indictment for obstructing it.

It is said to have been adjudged that if a river be stopped to the nuisance of the country, and none appear bound by prescription to clear it, those who have the piscary, and the neighbouring towns, who have a common passage and easement therein, may be compelled to do it. (*q*) For nuisances in the nature of obstructions an indictment will of course lie, if the river be such as may be considered a public highway.

SECTION IV.

OF NUISANCES TO PUBLIC BRIDGES.

Of public bridges.

The more ancient cases do not supply any immediate definition or description in terms of what shall be considered "public bridges." But a distinction between a public and a private bridge is taken in one of the books, (*r*) and made to consist principally in its being built for the common good of all the subjects, as opposed to a bridge made for private purposes: and though the words "public bridges" do not occur in the statute 22 Hen. VIII. c. 5. (called the statute of bridges) yet as that statute empowers the justices of the peace to enquire of "all manner of annoyances of bridges broken *in the highways*," and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge *in a highway* is a public bridge for all purposes of repair connected with that statute. And, "if the "meaning of the words *public bridge* could properly be

(*p*) Rex *v.* Watts, 2 Esp. R. 675. 2 Roll. Abr. 137.
(*q*) 1 Hawk. P. C. c. 75. s. 13. (*r*) 2 Inst. 701.
5 Bac. Abr. *Nuis.* (C). 37 Ass. 10.

" derived from any other less authentic source than this " statutable one, they might safely be defined to be such " bridges as all his majesty's subjects had used freely and " without interruption, as of right, for a period of time com- " petent to protect themselves, and all who should there- " after use them, from being considered as wrong doers in " respect of such use, in any mode of proceeding, civil or " criminal, in which the legality of such use might be " questioned." (*s*)

Of private bridges.

But a bridge built for the mere purpose of connecting a private mill with the public highway, or for any other such merely private purpose, would not necessarily become a part of the highway, although the public might occasionally participate with the private proprietor in the use of it: and it is not every sort of bridge, erected possibly for a temporary purpose, during a time of flood that may have rendered the ordinary fords impassable, or the ordinary means of passage impracticable, which can be considered as a *bridge in a highway*, to be repaired, when broken down, according to the provisions of the statute of bridges. (*t*)

Dedication of a bridge to the public.

As there may be a dedication of a road to the public; (*u*) so in the case of a bridge, though it be built by a private individual, in the first instance, for his own convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. (*w*) And though, where there is such a dedication, it must be absolute, (*x*) yet it may be definite in point of time; so

(*s*) By Lord Ellenborough, C. J. in Rex *v.* the Inhabitants of Bucks, 12 East. 204.

(*t*) Rex *v.* the Inhabitants of Bucks, 12 East. 203, 204.

(*u*) *Ante*, 450.

(*w*) Rex *v.* the Inhabitants of Glamorgan, 2 East. 356. Glasburne bridge case, 5 Burr. 2594. 2 Blac. R. 687. Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 342. And see *post*, 503, *et seq.*

(*x*) According to the doctrine in Roberts *v.* Karr, 1 Camph. 262. in the note. And see *ante*, 451.

that a bridge may be a public bridge, if it be used by the public, at all such times only as are dangerous to pass through the river. (*y*) A bar across a public bridge, kept locked, except in times of flood, is conclusive evidence that the public have only a limited right to use the bridge at such times: and if an indictment for not keeping it in repair states that it is used by the king's subjects, "at their free will and pleasure," the variance is fatal. (*z*)

A bridge may be indictable as a nuisance.

But a bridge built in a public way, without public utility, is indictable as a nuisance; and so it is if built colourably in an imperfect or inconvenient manner, with a view to throw the onus of rebuilding or repairing it immediately on the county. (*a*)

Of nuisances to bridges by obstructions.

Where a bridge is, in the sense which has been described, a bridge *in a highway*, it will of course be as public as the highway itself in which it is situate, and of which, for the purpose of passage, it must be understood to form a part. (*b*) All actual obstructions, therefore, to such bridges will come within the rules already stated with respect to nuisances to highways by obstruction, (*c*) and do not require a repetition in this place. There is, however, one case not previously mentioned, where the defendant was indicted for not repairing a house adjoining to a public bridge, which he was bound to repair *ratione tenuræ*, but permitted it to be so much out of repair that it was ready to fall upon people passing over the bridge. It was found by a special verdict that the defendant was only tenant at will of the house; but the court adjudged that he ought to repair, so that the public should not be prejudiced; and though not properly

(*y*) Rex *v.* the Inhabitants of Northampton, 2 M. and S. 262.

(*z*) Rex *v.* the Marquis of Buckingham, 4 Campb. 189.

(*a*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. R. 342. But see *post*, 43 Geo. III. c. 59. s. 5. as to the liability of counties to repair bridges *thereafter* to be erected.

(*b*) Rex *v.* the Inhabitants of Bucks, 12 East. 202, 203.

(*c*) *Ante*, 461. *et sequ.*

chargeable to repair the house *ratione tenuræ*, yet that the averment should be intended of the possession, and not of the service. (*d*) It may also be mentioned that by the 13 Geo. III. c. 78. s. 63. if any person collecting the tolls of a public bridge shall keep any victualling house, alehouse, or other place of public entertainment, or shall sell, or permit to be sold therein, any wine, beer, liquors, &c. by retail, he shall, upon conviction before a justice of the peace, forfeit five pounds for every such offence.

Of nuisances to bridges by not repairing them.

The nuisances which more frequently arise to the public in respect of bridges are in the nature of *non-feazance*, from the neglect of the parties, upon whom the burden is thrown, to keep them in a proper state of repair.

The county is of common right liable to the repair of all public bridges, but they may shew that others are liable.

As parishes are bound to repair the public ways within their district, so the inhabitants of the county at large are, *primâ facie*, and of common right, liable to the repair of all public bridges within its limits; unless they can shew a legal obligation on some other persons or public bodies to bear the burthen: (*e*) and this without any distinction as to foot, horse, or carriage bridges. (*f*) But a corporation aggregate, either in respect of a special tenure of certain lands, or in respect of a special prescription, and also any other persons by reason of such special tenure, may be compelled to repair them. (*g*) And if part of a bridge lie within a

(*d*) Reg. *v.* Watson, 2 Lord Raym. 856.

(*e*) 2 Inst. 700, 701. in the comment upon the statute of bridges, 22 Hen. VIII. c. 5. The reparation of public bridges was part of the *trinoda necessitas* to which, by the ancient law, every man's estate was liable, namely, *expeditio contra hostem, arcium constructio, et pontium reparatio.*

(*f*) By Lord Ellenborough, C. J. in Rex *v.* the Inhabitants of Salop, 13 East. 97. The point was not argued, as it was brought before the court by a special case, reserved upon the trial of an indictment at the sessions, which the court considered as a very great irregularity, and did not pronounce any judgment.

(*g*) 1 Hawk. P. C. c. 77. s. 2. 1 Bac. Abr. *Bridges.* A body politic may be bound either *ratione tenuræ sive præscriptionis*; but a private person does not appear to be liable

franchise, those of the franchise may be charged with the repairs for so much: also by a special tenure a person may be charged with the repairs of one part of a bridge, and the inhabitants of the county be liable to repair the rest. (*h*) A prescription, that the lords of the manor ought to repair a bridge, is good, being laid *ratione tenuræ*, by reason of the demesnes of the manor. (*i*) And as the obligation is by reason of the demesnes of the manor, if part of the demesnes be granted to an individual, he will be obliged to contribute to the repairs; but the indictment may be against any of the tenants of the demesnes, and it will be no defence on an indictment against one of them that another is also liable. (*k*) And where an individual is liable to repair a bridge, his tenant for years, being in possession, will be under the same obligation, and liable to an indictment for the neglect. (*l*)

In a late case a question was made, as to the evidence on which a jury might find, that the defendants were an immemorial corporation, and liable, in their corporate character, to the repair of a bridge.

Stratford upon Avon case. Immemorial corporation liable in their corporate cha-

The evidence was of a charter of Edward VI. granted upon the recited prayer of the *inhabitants* of the borough of *Stratford upon Avon*, "that the king would esteem them, "the inhabitants, worthy to be *made*, *reduced*, *and erected*, "into a body corporate and politic;" and thereupon pro-

upon a general prescription. 2 Inst. 700. 13 Co. 33. 1 Salk. 358. 3 Salk. 77, 381. and see *ante*, 401.

(*h*) 1 Bac. Abr. *Bridges*. 1 Hawk. P. C. c. 77. s. 1.

(*i*) Reg *v.* Sir John Bucknall, 2 Lord Raym. 804. In the first instance, at *Nisi Prius*, (2 Lord Raym. 792) Holt, C. J. ruled that the prescription was good without saying *ratione tenuræ*, on the ground that the manor might have been granted to be held by the service of repairing the bridge before the statute *quia emptores terrarum*, or that the king might make such a grant, he not being bound by the statute; but he afterwards changed his opinion.

(*k*) *Id. Ibid.* 792. Reg. *v.* the Duchess of Buccleugh, 1 Salk. 358. And see *ante* 470, 471.

(*l*) Reg. *v.* Sir John Bucknall, 2 Lord Raym. 804. And see Reg. *v.* Watson, 2 Lord Raym. 856. *ante*, 495, 496. See also *ante*, 477. note (*u*).

racter to the repair of a bridge.

ceeding to "*grant* (without any word of *confirmation)* unto "the *inhabitants* of the borough, that the same borough "should be a free borough for ever thereafter;" and then proceeding to incorporate them by the name of the bailiffs and burgesses, &c. And this, it was considered, would, without more, imply a new incorporation. But the same charter recited that it was an *ancient borough*, in which a guild was theretofore founded, and endowed with lands, out of the *rents, revenues, and profits* of which a school and an alms-house were maintained, and *a bridge was from time to time kept up and repaired;* which guild was then dissolved, and its lands lately come into the king's hands; and further recited that *the inhabitants of the borough, from time immemorial*, had enjoyed *franchises, liberties*, free customs, *jurisdictions*, privileges, exemptions, and immunities, by reason and pretence of the guild, and of charters, grants, and confirmations to the guild, *and otherwise*, which the inhabitants could not then hold and enjoy by the dissolution of the guild, and for other causes, by means whereof it was likely that the *borough* and its *government* would fall into a worse state without speedy remedy; and that thereupon *the inhabitants of the borough* had prayed the king's favour (for *bettering the borough and government thereof*, and *for supporting the great charges* which from time to time they were bound to sustain,) to be deemed worthy to be made, &c. a body corporate, &c. And thereupon the king, after granting to the inhabitants of the borough to be a corporation (as before stated), granted them the same *bounds and limits as the borough and the jurisdiction* thereof *from time immemorial* had extended to. And then "willing that the *alms-house* and "*school* should be kept up and maintained as theretofore, "(without naming the *bridge)* and that the *great charges to* "*the borough and its inhabitants* from time to time *incident* "might be thereafter *the better sustained and supported*," granted to the corporation the lands of the late guild. There was also evidence by parol testimony, as far back as living memory went, that *the corporation* had always *repaired the bridge*. And the court held that, taking the whole of

the charter and the parol testimony together, the preponderance of the evidence was, first, that this was a *corporation by prescription*, though words of creation only were used in the incorporating part of the charter of Edw. VI.; and, secondly, that the burden of repairing the bridge was upon such prescriptive corporation, during the existence of the guild, before that charter; though the guild out of their revenues had, in fact, repaired the bridge, but only in ease of the corporation, and not *ratione tenuræ;* and that the corporation were still bound *by prescription*, and not merely by *tenure*. A verdict, therefore, against them upon an indictment for the non-repair of the bridge, charging them as *immemorially* bound to the repair of it, was held to be sustainable. (*m*)

22 Hen. VIII. c. 25. enacts as to the repairing of bridges.

The statute 22 Hen. VIII. c. 5. called the statute of bridges, and made in affirmance of the common law, enacts, that the justices of the peace in every shire, franchise, or borough, or four of them, whereof one to be of the quorum, may inquire and determine, in their general sessions, of annoyances of bridges broken in the highways, and make such process and pains on every presentment against the persons charged, &c. as the King's Bench is used to do, or as it shall seem by their discretions to be necessary and convenient. (*n*) It then enacts, that where it cannot be known what hundred, city, town, &c. ought to make such bridges decayed, they shall, if without city or town corporate, be made by the inhabitants of the shire or riding; and if within any city or town corporate, then by the inhabitants of such city or town corporate; and that if part shall be in one shire, &c. and part in another, the inhabitants of each shall repair and make such part as lies within their respective limits. (*o*) The statute then proceeds (after making provisions for the taxing of the persons liable to contribute to the repairs and for the appointment of collectors, &c.) by enacting that such

(*m*) Rex v. the Mayor, &c. of Stratford upon Avon, 14 East. 348.

(*n*) S. 1.

(*o*) S. 2, 3.

And as to the repairing of 300 feet of the highways next adjoining to the bridges.

parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require, and that the justices, or four of them, whereof one to be of the quorum, within their several limits, may enquire and determine, in their general sessions, all annoyances therein, and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges, by virtue of the act. (*p*) It has been holden in the construction of this statute that no private bridges are within its purview, but only such as are common in the highways where all the king's liege people have or may have passage. (*q*) Unless the justices of a town, &c. be four in number, and one of the quorum, they have no jurisdiction under this statute. But the justices of the county in which such town (not being a county of itself, and not having the number of justices,) shall lie, may determine as to the annoyances of bridges within the town, &c. if it be known for a certainty what persons are bound to repair them; but if it be not known, it seems that such annoyances are left to the remedy at common law. (*r*)

Where the county of a city is enlarged, it may be liable to repair a bridge in the district so added.

It appears also to have been holden, that where the king enlarges the boundaries of a city, by annexing part of the county to the county of the city, the enlarged part is to be considered as parcel of the old county of the city, so as to charge its inhabitants with the repairs of bridges which were situate, at the time when the statute 22 Hen. VIII. c. 5. was made, within the county at large. The point was put upon the ground that the statute lays no absolute charge till a bridge is in decay; so that though, when the statute was made, the bridges in question were within the county of *Norfolk*, yet, as they were not then in decay, the statute had no operation upon them before they were annexed to the city of *Norwich*. (*s*)

(*p*) S. 9.

(*q*) 1 Hawk. P. C. c. 77. s. 19. and see *ante*, 493, 494.

(*r*) 1 Hawk. P. C. c. 77. s. 20. 2 Inst. 702.

(*s*) Rex *v.* the Inhabitants of

No persons can be compelled to build new bridges.

But though the inhabitants of a county by common right, and other persons by the obligations which have been mentioned, are bound to repair existing bridges, no person can be compelled to build, or contribute to the building, any *new bridge*, without an act of parliament; nor can the inhabitants of a county, by their own authority, change a bridge or highway from one place to another. (*t*) Before the statute 14 Geo. II. c. 33. the justices at the sessions had no authority to change the situation of bridges: but by that statute they were empowered, at their quarter sessions, to purchase any piece of land adjoining or near to any county bridge, within the limits of their respective commissions, for the more commodious enlarging or convenient re-building the same; but the land was not to exceed an acre for any such bridge. (*u*) It was considered by a very learned judge, that this statute impliedly enabled the magistrates to alter the position of bridges to suit the convenience of the public: (*v*) but a more recent statute expressly gives them that power where bridges are so much in decay as to require to be taken down. The 43 Geo. III. c. 59. s. 2. enacts, "that "where any bridge or bridges, or roads at the ends thereof, "repaired at the expence of any county, shall be narrow "and incommodious, it shall and may be lawful to and for "the justices, at any of their general quarter sessions, to "order and direct such bridge or bridges and roads to be "widened, improved, and made commodious for the pub-"lic; and that where any bridge or bridges, repaired at the "expence of any county, shall be so much in decay as to

By the 43 Geo. III. c. 59. s. 2. power is given to justices at the quarter sessions to order bridges to be widened, &c. or rebuilt either in the old situation, or in one more convenient.

Norwich, 1 Str. 177. And see also Rex *v.* the Inhabitants of St. Peter in York, 2 Lord Raym, 1249.

(*t*) 2 Inst. 700, 701. By *Magna Charta* it is enacted that *nulla villa nec liber homo distringatur facere pontes, aut riparias, nisi qui ab antiquo et de jure facere consueverunt tempore Henrici regis avi nostri.* And see 2 Inst. 29.

(*u*) 14 Geo. II. c. 33. s. 1. It also provides for the payment of the land out of the county rates, and its conveyance to such persons as the justices shall appoint, in trust for the purposes of the bridge.

(*v*) By Buller, J. in Rex *v.* the Justices of Glamorganshire, 5 T. R. 283.

"render the taking the same wholly down necessary or "expedient, it shall and may be lawful to and for the said "justices, at any of their said general quarter sessions, to "order and direct the same to be rebuilt, either on the old "site or situation, or in any new one more convenient to "the public, contiguous to or within two hundred yards of "the former one, as to such justices shall seem meet." And the statute also provides for the purchasing of land necessary for such purposes, not exceeding an acre at any one bridge; and for assessing a compensation for such land, by means of a jury, where the surveyor cannot agree for the price with the owner, in the same manner as is done by the 13 Geo. III. c. 78. in relation to highways. (*w*) By a subsequent statute, 54 Geo. III. c. 90. s. 1. these provisions, relating to the purchase of land, are extended to such buildings and other erections as may be necessary to be purchased for the purposes of the act of the 43 Geo. III.; and the provisions of the 43 Geo. III. (except such as relate to bridges thereafter to be re-erected (*x*)) are extended as well to bridges, and the roads at the ends thereof, repaired by the inhabitants of hundreds, and other general divisions in the nature of hundreds, as to bridges and the roads at the ends thereof, repaired by the inhabitants of counties.

Pulling down an old bridge before the new one was passable.

In a case where the justices of the county of *Dorset*, proceeding under this statute, had contracted for the building of a new bridge in a different site, in lieu of the old one, which was ruinous; and had directed the old bridge to be taken down before the new one was passable, for the benefit of the old materials, which were to be used by the contractor in finishing the new bridge; the court refused a writ of prohibition to them, to restrain them from pulling down the old bridge before the new one was passable: and this, though there were strong affidavits of the inconve-

(*w*) *Ante*, 454. This act of the 43 Geo. III. is not to extend to bridges repaired by reason of tenure, &c. S. 7.

(*x*) *Post*, 506.

nience and loss which would be sustained by the people in the neighbourhood, by being obliged to use a circuitous way in the interval. And they referred the complainants to the ordinary remedy by indictment, if the pulling down the old bridge, under these circumstances, were a nuisance; and did not think there was any occasion to interfere, by applying a prompt remedy of a novel kind in modern practice. (*y*)

Counties liable to the repair of bridges built by private persons.

The question, whether the inhabitants of a county, from their common law liability to the repair of public bridges, are liable to repair a bridge not originally built by them, appears to have been formerly a subject of much discussion. But, after able argument and great consideration, the principle was established "that if a man build a bridge, and it "*become useful* to the county in general, the county shall "repair it." (*z*) Upon this principle, where the inhabitants of a township took down an ancient foot-bridge, which they were bound to repair, and built another, for horses and carriages, in a different and more commodious part of the river, which became afterwards of general public utility, it was held that this bridge should be repaired by the county, and not by the township. (*a*) And the same principle of the public being obliged to support a bridge of public utility, has been acted upon in many subsequent cases. Thus the county was held liable to repair a bridge, which, about forty years before, had been erected by an individual, for his private benefit and utility, and for making a commodious way to his tin-works, upon proof that the public had constantly used the bridge from the time of its being built. (*b*) And in a case where an old foot-bridge had been enlarged, in the first instance to a horse-bridge, and afterwards to a carriage-bridge, by a township, at their expence,

(*y*) Rex *v.* the Justices of Dorset, 15 East. 594.

(*z*) Glusburne Bridge case, 5 Burr. 2594. 2 Blac. R. 285.

(*a*) *Id. Ibid.*

(*b*) Rex *v.* the Inhabitants of Glamorgan. 2 East. 356. note (*a*) 1 Bac. Abr. *Bridges.*

it was recognized as the general law that where a township, or any private individuals, build a new bridge, and dedicate it to the public benefit, and it is used by the public, the *onus* of repairing it falls upon the county at large. (*c*) In a case also where the doctrine was fully investigated and considered, it was held that the county or riding was liable to the repair of a bridge built by trustees under a turnpike act, there being no special provision for exonerating them from the common law liability, or transferring it to others. (*d*)

In a case where it appeared that queen Anne, in the year 1708, for her greater convenience in passing to and from *Windsor* castle, built a bridge over the *Thames*, at *Datchet*, in the common highway leading from *London* to *Windsor*, in lieu of an ancient ferry, with a toll, which belonged to the crown; and she and her successors maintained and repaired the bridge till 1796, when, being in part broken down, the whole was removed, and the materials converted to the use of the king, by whom the ferry was re-established as before; it was held that the bridge was a public one, repairable by the inhabitants of the county. (*e*) And in a more recent case, where the facts were, that a person about forty-five years before had erected a mill, and dam thereto, for his own profit, by which means he deepened the water of a ford through which there was a public highway, but the passage through which was, before the deepening, very inconvenient at times to the public, and the miller had afterwards built a bridge over it, which the public had ever since used; it was decided that the county, and not the miller, were chargeable with the reparation. (*f*) In this last case the court was much pressed by an ancient authority to this

(*c*) Rex *v.* the West Riding of Yorkshire, 2 East. 353. note (*a*).

(*d*) *Id. Ibid.* 2 East. 342. and the circumstance of the trustees being enabled to raise tolls for the support of the roads was not considered as taking the case out of the general principle.

(*e*) Rex *v.* the Inhabitants of Bucks, 12 East. 192.

(*f*) Rex *v.* the Inhabitants of Kent, 2 M. and S. 513.

effect: "If a man erect a mill for his own profit, and make "a new cut for the water to come to it, and make a new "bridge over it, and the subjects use to go over this as over "a common bridge; this bridge ought to be repaired by "him who has the mill, and not by the county, because he "erected it for his own benefit." (g) And as that authority seemed to constitute an anomaly in the law, and to be at variance with all the cases, the court directed a diligent search to be made for the record of the case; and it was at length found in the chapter-house at *Westminster*. From that it appeared that the real question was on an obligation to repair by reason of the tenure of certain lands; and that no such question as was supposed, namely, of a legal obligation resulting from the building of the bridge by the mill owner for his benefit, was ever directly or indirectly decided, or could properly have been argued. (*h*) Relieved, therefore, from this case, the court considered the authorities from first to last as uniform; and as establishing the doctrine that if a private person build a private bridge, which afterwards becomes of public convenience, the county is bound to repair it. (*i*)

A bridge built without public utility, or colourably to charge the county, may be a nuisance.

But though a bridge built by an individual may thus become public, yet it will not become so from the mere circumstance of its being built in a public way: and it appears to have been considered that a bridge built in a public way,

(g) 1 Roll. Abr. 368. citing the 8 Edw. II. as adjudged in B. R. for *Bow* bridge and *Channel* bridge, against the prior of *Stratford*.

(*h*) See a copy of the record in this case of the *Stratford* bridge, in 2 M. and S. 320. *et sequ.* It contains matter of great curiosity.

(*i*) Rex *v.* the Inhabitants of Kent, 2 M. and S. 320. This doctrine appears to have been laid down long ago in a case cited by *Northey*, attorney general, in Rex *v.* the Inhabitants of *Wilts*, 1 Salk. 359. With respect to the property in the materials of a bridge, when built and dedicated to the public, it appears to have been decided that it still continues in the individual subject to the right of passage by the public, so that when severed and taken away by a wrong doer he may maintain trespass for the asportation. Harrison *v.* Parker and another, 6 East. 154.

without public utility, or built colourably in an imperfect or inconvenient manner, with a view to throw the burthen of rebuilding or repairing it immediately on the county, may be indicted as a nuisance. (*j*) A protection is also given to counties by the 43 Geo. III. c. 59. from the burthen of repairing certain bridges, erected after the passing of that statute. The fifth section, for the more clearly ascertaining the description of bridges, thereafter (*k*) to be erected, which inhabitants of counties shall be liable to repair and maintain, enacts, "that no bridge hereafter to be erected or built "in any county, by or at the expence of any individual or "private person or persons, body politic or corporate, shall "be deemed or taken to be a county bridge, or a bridge "which the inhabitants of any county shall be compellable "or liable to maintain or repair, unless such bridge shall "be erected in a substantial and commodious manner, under "the direction or to the satisfaction of the county surveyor, "or person appointed by the justices of the peace at their "general quarter sessions assembled, or by the justices of "the peace of the county of *Lancaster*, at their annual "general sessions; and which surveyor or person so ap-"pointed is hereby required to superintend and inspect the "erection of such bridge, when thereunto requested by the "party or parties desirous of erecting the same; and in case "the said party or parties shall be dissatisfied, the matter "shall be determined by the said justices respectively at "their next general quarter sessions, or at their annual "general sessions in the county of *Lancaster*." (*l*)

And by 43 Geo. III. c. 59. counties are not to be charged with the repairs of bridges built after the passing of that statute, unless built in a substantial manner, to the satisfaction of the county surveyor.

It may be useful shortly to notice a few cases in which counties have been holden not to be liable to repair certain

Cases where counties have been holden

(*j*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 342. *ante*, 495.

(*k*) The date of the act is *June* 24, 1803.

(*l*) Section 7. provides, that nothing in the act contained shall extend to any bridges or roads which any person or persons, bodies politic or corporate, is, are, or shall be liable to maintain or repair by reason of tenure or by prescription, or to alter or affect the right to repair such bridges or roads.

bridges built by companies or trustees under particular acts of parliament.

not to be liable to repair bridges built by companies or trustees under particular acts of parliament.

Where the *Medway* Navigation Company, being empowered under a local act to make the river navigable, and to take tolls, and "to amend or alter such bridges or high-"ways as might hinder the passage or navigation, *leaving* "*them or others as convenient in their room*," had, forty years before, destroyed a ford across the river in the common highway, by deepening its bed, and built a bridge over the same place; it was held that they were bound to keep such bridge in repair, as under a continuing condition to preserve the new passage in lieu of the old one, which they destroyed for their own benefit. (*m*)

A case not distinguishable in principle from the foregoing was decided shortly afterwards. A canal company, authorized by an act of parliament to make the river *Bain* navigable, and to make and enlarge certain navigable cuts, and build bridges and other works connected with the navigation, made a navigable cut, and deepened a ford which crossed the highway, for their own benefit, and thereby rendered a bridge necessary for the passage of the public, which was accordingly built at the expence of the company in the first instance: and it was held that the company (who were found to have profitable funds for the purpose) were bound to maintain it. (*n*)

The 49 Geo. III. c. 84. appoints trustees for taking down the old and building a new bridge over the river *Tone*, and empowers them to take tolls; and enacts, that it shall be lawful for them, out of the monies received, to build a new bridge, &c. and vests the property in the old and new bridge, during the continuance of the act, in the trustees;

(*m*) Rex *v.* the Inhabitants of Kent, 13 East. 220.

(*n*) Rex *v.* the Inhabitants of Lindsey, in Lincolnshire, 14 East. 317.

and further enacts, that as soon as the purposes of the act shall be executed, *then and from thenceforth* the tolls shall cease, and the bridge, &c. shall be repaired by such persons as are by law liable to repair the old bridge. Upon this statute it was decided that, during the time the trustees were engaged in executing the powers of the act, and before they had completed them, the county was not liable to repair the bridge. (*o*)

Of the liability to repair the 300 feet of the roads adjoining to the ends of bridges.

It has been seen, (*p*) that by the statute 22 Hen. VIII. c. 5. it is enacted, that such parts of highways as lie next adjoining to the ends of bridges, by the space of three hundred feet, shall be amended as often as need shall require: but it does not say by whom they shall be amended. It proceeds, however, to provide that the justices may enquire and determine and do in every thing concerning the same in as ample a manner as they may do for making and repairing bridges by virtue of that act. (*q*) It has been decided that by the common law, declared and defined by this statute, and other subsequent statutes, (*r*) the inhabitants of a county, liable to the repair of a public bridge, are liable also to repair to the extent of *three hundred feet* of the highway at each end of it: and that, if indicted for not repairing such highway, they can only exonerate themselves by pleading specially that some other is bound to repair it by prescription or tenure. (*s*) But where a new and substantial bridge, of public utility, was built within the limit of one county, and adopted by the public, it was held that the inhabitants of that county were bound to repair it, although it was built

(*o*) Rex *v.* the Inhabitants of Somerset, 16 East. 305. Lord Ellenborough, C. J. intimated an opinion, that if the trustees were dilatory in executing the powers of the act, the court of King's Bench, upon application, would lend its aid to expedite their functions.

(*p*) *Ante*, 499, 500.

(*q*) *Ante*, *Ibid.*

(*r*) 1 Anne, st. 1. c. 18. s. 3, 5, 13. and 12 Geo. II. c. 29.

(*s*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 7 East. 588. and the judgment was afterwards affirmed in the house of Lords, 5 Taunt. 284.

within three hundred feet of an old bridge, repairable by the inhabitants of another county, who were bound as a matter of course under the statute 22 Hen. VIII. c. 5. to maintain three hundred feet of road adjoining to their bridge, though it lay in the other county. The court said, that while the space where the bridge was built continued a road, it was repairable as part of the old bridge; but that when there was a substantial bridge built upon it, such bridge was repairable, as a bridge by the inhabitants of the county in which it was situated, according to the statute. (*t*)

Those who are liable to repair must do it effectually.

It seems clear that those who are bound to repair public bridges must make them of such height and strength as shall be answerable for the course of the water, whether it continues in the old channel, or makes a new one; and that they are not punishable as trespassers for entering on any adjoining land for such purpose, or for laying on the materials requisite for such repairs. (*u*) A case has occurred in which the court of King's Bench strongly intimated their opinion that if a bridge used for carriages, though formerly adequate to the purposes intended, be not of a sufficient width to meet the present public exigencies, owing to the increased width of carriages, the burden of widening it must be borne by those who are bound to repair the bridge: (*w*) but, when the same case came before the house of Lords on error, this point appears to have been considered as doubtful. (*x*)

Of the mode of procuring

The taxing and collecting monies for the repairing of

(*t*) Rex *v.* the Inhabitants of Devon, 14 East. 477.

(*u*) 1 Hawk. P. C. c. 77. s. 1. 1 Bac. Abr. *Bridges*. 43 Ass. pl. 37. Br. tit. *Presentments in Courts*, pl. 22. 29 Dalt. c. 14.

(*w*) Rex *v.* the Inhabitants of Cumberland, 6 T. R. 194.

(*x*) Cumberland Inhabitants *v.* Rex, 3 Bos. and Pul. 354. But the judgment of the court of King's Bench was affirmed upon the ground that, after verdict, it must be presumed that the over-narrowness of the bridge arose from its having been contracted from its ancient width.

the monies for the repairs of bridges, and of contribution.

bridges and the highways at the ends thereof were regulated in the first instance by 22 Hen. VIII. c. 5. and afterwards by the 1 Anne, stat. 1. c. 18. by which the justices at their quarter sessions were empowered, upon presentment of any bridge being out of repair, to make assessments upon every town or place within their commissions for the charges of the repairs. The 12 Geo. II. c. 29. s. 1., for the better collection of such monies, appointed that they should be paid out of the general county rate: but that statute enacted that no money should be applied to the repair of any bridge until a *presentment* should be made by the grand jury of its want of reparation. The 43 Geo. III. c. 59. s. 2. which provides for the amendment and alteration of county bridges,(*y*) also enacted, that no money should be applied to such purposes until *presentment* made of the insufficiency or want of reparation of such bridges. The late statute 55 Geo. III. c. 143. makes an alteration in this respect and in other matters relating to the proceedings of the justices for the repairing of bridges repairable by counties or hundreds. It enacts that "it shall and may be lawful to and for the justices of "the peace of any county, city, riding, division, town corporate or liberty, at their general quarter sessions respectively, to contract and agree, or to authorize any "other person or persons to contract and agree, with "any person or persons, for the maintaining and keeping in repair any county or hundred bridge, and the road "over such county or hundred bridge, and so much of the "roads at the ends thereof as are by law liable to be repaired "at the expence of any such county, hundred, city, riding, "division, town corporate or liberty, or any part of the "same; and the said justices are hereby empowered to "order such sum or sums of money as may be contracted "for and agreed to be paid for the repairing, amending, "and supporting such bridges, and the roads over the "same, or the ends thereof, to be paid (in cases where the "county is liable to the repair thereof) by the treasurer of

55 Geo. III. c. 143. Justices, &c. may contract for the repairing of county or hundred bridges, and the roads adjoining, and order payment out of the county rate, or by the bridge master of the hundred, although no presentment shall have been made, nor notice given according to 12 Geo. II. c. 29. But notices of the intention to contract are to be given in a public paper.

(*y*) *Ante*, 501, 502.

" the county out of the county rate, or (in cases where the " hundred is liable to the repair of the same) by the bridge " master (or other public officer charged with the repair of " bridges) of the hundred by which such bridge is liable to " be repaired, for any term not exceeding seven years, nor " less than one, although no presentment of the insuffi- " ciency, decay, or want of repair of the same, shall have " been made, and although no public notice shall have been " given by the said justices, at their respective general or " quarter session, of their intention to contract for the re- " pair of such bridges, or the roads at the ends thereof, as " respectively directed by the said act (12 Geo. II. c. 29.) " provided nevertheless that, before any such contract shall " be made, the said justices shall cause notices to be given " in some public paper circulated in such county, city, rid- " ing, hundred, division, town corporate or liberty, of their " intention to contract." (*z*) By the statute 22 Hen. VIII. c. 5. s. 3. it was provided that where part of a county bridge shall be in one shire, &c. and part in another, the inhabitants of each shire, &c. shall be contributory. (*a*) And it has been questioned whether a borough, which has no bridge within its own limits, be not liable to contribute to the repairs of a county bridge. (*b*) Where certain townships had enlarged a bridge to a carriage-bridge, which they were before bound to repair as a foot-bridge, it was held that they should still be liable to repair *pro ratâ*. (*c*)

The methods of appointing surveyors, &c. for effecting the repairs or re-building of bridges; and the powers given to such surveyors, and persons employed under contracts, to

(*z*) 55 Geo. III. c. 143. s. 5.

(*a*) This provision is alluded to by Lord Mansfield, C. J. in Rex *v.* the Inhabitants of Weston, 4 Burr. 2511. and by counsel *arguend.* in Rex *v.* Clifton, 5 T. R. 501, 2. The usual proceeding at this time appears to be to indict each county separately, for neglecting to repair its own division.

(*b*) 1 Hawk. P. C. c. 77. s. 25. 1 Keb. 68.

(*c*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 353. note (*a*) and see Rex *v.* the Inhabitants of Surry, 2 Campb. 455.

procure materials for such purposes, are contained in different acts of parliament, the provisions of which do not fall within the object of this work. (*d*)

Proceedings for nuisances to bridges by information, presentment, or indictment.

Where those upon whom the liability rests of repairing public bridges neglect their duty, such non-feazance is a nuisance to the public, punishable by information, presentment, or indictment. An *information* was held to lie in the court of King's Bench for the non-repair of a bridge in a case where it was considered that the statute of 22 Hen. VIII. c. 5. gave only a concurrent, but not an exclusive, jurisdiction to the sessions: (*e*) but probably it would not be granted, except in some case of a peculiar nature, in which the court might be satisfied that the purposes of justice would not be effected by an indictment. The more usual course of proceeding is by indictment or presentment. (*f*)

Proceedings of justices in sessions.

The statute 22 Hen. VIII. c. 5. s. 1. gave power to the justices of the peace to hear and determine in their general sessions all annoyances of bridges broken in the highways, and to make process, &c. as the King's Bench used to do. The fifth section of that statute enacted, that where any bridge is in one shire, and the persons or lands, which ought to be charged, are in another shire; or where the bridge is within a city or town corporate, and the persons or lands that ought to be charged are out of the said city; the justices of such shire, city, or town corporate, shall have power to hear and determine such annoyances, being within the limits of their commission; and if the annoyance be

(*d*) See them collected in 1 Burn. Just. *Bridges* VI. and see also the late act 55 Geo. III. c. 143. By the 43 Geo. III. c. 59. s. 4. inhabitants of counties may sue for damages done to bridges in the name of the surveyor.

(*e*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177.

(*f*) 2 Inst. 701. It has been held that an action will not lie by an individual against the inhabitants of a county for an injury sustained from a county bridge being out of repair. Russel *v.* Men of Devon, 2 T. R. 667.

presented, then to make process into every shire of the realm against such as ought to repair the same, and to do further in every behalf as they might do if the persons or lands chargeable were in the same shire, city, or town corporate where the annoyance is.

Of the indictment.

Any particular inhabitant or inhabitants of a county, or tenant or tenants of land chargeable with the repairs of a public bridge, may be made defendants to an indictment for not repairing it, and be liable to pay the whole fine assessed by the court for the default of such repairs; and shall be put to their remedy at law for a contribution from those who are bound to bear a proportionable share in the charge. (*g*) The indictment ought to shew what sort of bridge it is; whether for carts and carriages, or for horses or footmen only: and if the duty to repair arise by reason of the tenure of certain lands, the indictment must shew where those lands lie. (*h*) It has been holden, that an indictment charging an individual with the repair of a bridge, *by reason of his being owner and proprietor of a certain navigation*, is not equivalent to charging him *ratione tenuræ*, but is erroneous; and, if judgment be given thereon, it will be reversed upon a writ of error. And it seems that a count, charging an individual by reason of being owner of a navigation under a *private* act of parliament, must set forth the act. (*i*) In presentments by the grand jury, it is said that there is no occasion to shew who ought to repair; and that it is sufficient if the defect be shewn, and the bridge stated to be public. (*k*)

Of the plea.

It is laid down, that it is not sufficient for the defendants in an indictment for not repairing a bridge to excuse themselves by shewing either that they are not bound to repair

(*g*) 1 Hawk. P. C. c. 77. s. 3. 1 Bac. Abr. *Bridges*, where the reason given is, that cases of this nature require the greatest expedition; and bridges being of the utmost necessity are not to lie unrepaired till law suits are determined.

(*h*) 1 Hawk. P. C. c. 77. s. 5.

(*i*) Rex *v.* Kerrison, 1 M. and S. 435.

(*k*) 3 Chit. Crim. Law, 592. citing Andr. 285.

the whole or any part of the bridge, without shewing what other person is bound to repair it, and that in such case the whole charge shall be laid upon the defendants by reason of their ill plea. (*l*) But it is submitted that, from analogy to the case of highways, this doctrine must be understood only of indictments against the county, and not of indictments against individuals, or bodies corporate, who are not of common right bound to repair; because, as it lies on the prosecutor specially to state the grounds on which such persons are liable, they may negative these parts of the charge under the general issue. (*m*) And it has been holden upon an information for not repairing a bridge, that the defendants, if not chargeable of common right, may discharge themselves upon the general issue. (*n*) But it is clear that the inhabitants of a county, in order to exonerate themselves from the burden of repairing a bridge lying within it, must shew by their plea that some other person is liable to repair. (*o*) It has, however, been recently decided, that it is competent to the inhabitants of a county, upon the general issue, to give evidence of the bridge having been repaired by private individuals. But this evidence appears to have been considered barely admissible as a medium of proof that the bridge was not a public bridge, which undoubtedly the defendants had a right to prove by every species of evidence: and the court seemed to think that it would have but little effect; though in order to ascertain whether a bridge be public, the mode of its construction, and the manner of its continuance may be circumstances which, as they are connected with others, may have much or little weight. (*p*)

(*l*) 1 Hawk. P. C. c. 77. s. 4. 1 Bac. Abr. *Bridges*. 1 Burn. Just. *Bridges*, V.

(*m*) 3 Chit. Crim. L. 592.

(*n*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177. and see *ante*, 479, 480.

(*o*) Rex *v.* the Inhabitants of Wilts, 1 Salk 359. 2 Lord Raym. 1174.

(*p*) Rex *v.* the Inhabitants of Northampton, 2 M. and S. 262. If a bishop, &c. hath once or twice of alms repaired a bridge, this binds not; but yet it is evidence against him, that he ought to repair, un-

It is said, that where the defendants plead that an individual ought to repair the bridge mentioned in the indictment, and take a traverse to the charge against themselves, the attorney general, in this special case, may take a traverse upon a traverse, and insist that the defendants are bound to the repairs, and traverse the charge alleged against the individual: and that an issue ought to be taken of such second traverse; and that the attorney general may afterwards surmise that the defendants are bound to repair it, and that the whole matter shall be tried by an indifferent jury. (*q*) But where the inhabitants of a county are indicted for not repairing a bridge, and they throw the charge upon another, they ought not to traverse their obligation to repair; as it is a traverse of a matter of law, and might be made the subject of demurrer. (*r*)

The plea must correspond with the facts.

Where to an indictment against a riding for not repairing a public carriage bridge the plea alleged that certain townships had *immemorially* used to repair the said bridge, it was held that evidence that the townships had *enlarged* the bridge to a carriage bridge, which they had before been bound to repair as a foot bridge, would not support the plea. (*s*) And, upon the same principle, where it was proved that a particular parish was bound by prescription to repair an old wooden foot bridge, used by carriages only in times of flood, and that about forty years ago the trustees of the turnpike road built on the same site a much wider bridge of brick, which had been constantly used ever since by all carriages passing that way; it was holden that these facts did not support a plea pleaded by the county that the parish had *immemorially* repaired, and still ought to repair, the said bridge. (*t*) In a case where the county was indicted

less he proves the contrary, 2 Inst. 700.

(*q*) 1 Hawk. P. C. c. 77. s. 5. 1 Bac. Abr. *Bridges*.

(*r*) *Ante*, 480. and the authorities there cited.

(*s*) Rex *v.* the Inhabitants of the West Riding of Yorkshire, 2 East. 353. note (*a*).

(*t*) Rex *v.* the Inhabitants of Surry, 2 Campb. 455. The facts would not have availed the county

for not repairing a bridge, and pleaded that one *Marsack* was liable to repair *ratione tenuræ*, it was holden that this plea was not sustained by evidence that the estate of *Marsack* was part of a larger estate; which part *Marsack* purchased of the Lord *Cadogan*, who had retained the rest in his own hands, and had repaired the bridge as well before as after the purchase. (*u*)

Of the trial.

The stat. 1 Ann. st. 1. c. 18. s. 5. enacts, that all matters concerning the repairing and amending of bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere; but it seems that objection may be made to the justices where they are all interested, and that in such case the trial shall be had in the next county. (*w*) And no inhabitant of a county ought to be a juror for the trial of an issue, upon the question whether or not the county be bound to repair. (*x*) So that where the matter concerns the whole county, a suggestion may be made of any other county's being next adjacent: (*y*) and if the bridge lies within the county of a city, and the question is, whether the county of the city, or the county at large, ought to repair, on a suggestion of these facts on the record, the *venire* will be awarded into the county adjacent to the larger district. (*z*)

Inhabitants of counties to be admitted as witnesses in prosecutions against private persons, &c.

Inhabitants of counties may be witnesses in prosecutions against private persons or corporate bodies for not repairing bridges. The 1 Ann. stat. 1. c. 18. s. 13. reciting that many private persons, or bodies politic or corporate, were of right obliged to repair decayed bridges, and the highways

if the plea had been framed differently, as the county was clearly liable to the repair of the new bridge. See *ante*, 503.

(*u*) Rex *v.* the Inhabitants of Oxfordshire, 16 East. 223.

(*w*) Rex *v.* the Inhabitants of Norwich, 5 Geo. I. cited in 2 Burr. 859, 860. 1 Burn. Just. *Bridges*, V.

(*x*) 1 Hawk. P. C. c. 77. s. 6.

(*y*) Reg. *v.* the Inhabitants of Wilts, 6 Mod. 307. and see 1 Salk. 380. 2 Lord Raym. 1174.

(*z*) Rex *v.* the Inhabitants of Norwich, 1 Str. 177. 3 Chit. Crim. L. 593.

thereunto adjoining, and that the inhabitants of the county, riding, or division, in which such decayed bridges or highways lay, had not been allowed, upon informations or indictments against such persons or bodies for not repairing them, to be legal witnesses; enacts, that in all informations or indictments in the courts of record at *Westminster*, or at the assizes, or quarter sessions, the evidence of the inhabitants of the town, corporation, county, &c. in which such decayed bridge or highway lies shall be taken and admitted. Even before this statute such evidence had been thought admissible from necessity. (*a*)

Of the judgment.

As a prosecution for a nuisance to a public bridge has for its object the removal of the obstruction, or the effecting of the necessary reparations, the judgment of the court upon a conviction will generally be regulated by the same principles as those which have been mentioned in relation to the judgment for a nuisance to a highway. (*b*) The stat. 1 Ann. stat. 1. c. 18. s. 4. enacts, that no fine, issue, penalty, or forfeiture, upon presentments or indictments for not repairing bridges, or the highways at the ends of bridges, shall be returned into the *Exchequer*, but shall be paid to the treasurer, to be applied towards the repairs.

Of staying the judgment.

Where a county indicted for not repairing a bridge had pleaded a plea which their evidence did not support, and were in consequence found guilty, but the evidence seemed strongly to shew that they were not liable to repair; the court of King's Bench, upon a motion for a new trial, or for a stay of judgment against the defendants until another indictment was tried, directed a rule to be drawn up for staying the judgment upon payment of the costs of the prosecution: and Lord Ellenborough, C. J. added that, if the public exigency required it, the county must repair without prejudice to their case; and Le Blanc, J. said, that the

(*a*) Rex *v.* Carpenter, 2 Show. 47. (*b*) *Ante*, 484.

county might proceed to indict the parties whom they contended to be liable. (*c*)

Of the certiorari.

The 1 Ann. st. 1. c. 18. s. 5. enacts, that no presentment or indictment for not repairing bridges, or the highways at the ends of bridges, shall be removed by *certiorari* out of the county into any other court. But it has been decided that, notwithstanding these general words of the statute, an indictment for not repairing a bridge may be removed by certiorari at *the instance of the prosecutor.* (*d*) And it has been resolved, that this clause of the act extends only to bridges where the county is charged to repair; and that where a private person or parish is charged, and the right will come in question, the act of 5 W. and M. c. 11. had allowed the granting a certiorari. (*e*) A certiorari lies to remove an order made by the justices concerning the repair of a bridge, pursuant to a private act of parliament: and the justices ought to retain the private act upon which their order is founded. (*f*)

(*c*) Rex *v.* the Inhabitants of Oxfordshire, 16 East. 223.

(*d*) Rex *v.* the Inhabitants of Cumberland, 6 T. R. 194. The case was afterwards brought before the house of Lords by a writ of error, and the judgment was affirmed. 3 Bos. and Pul. 354. And see *ante*, 483.

(*e*) Rex *v.* the Inhabitants of Hamworth, 2 Str. 900. 1 Barnard. 445. See as to the stat. 5 W. and M. *ante*, 483.

(*f*) Dalt. 504. 1 Burn. Just. *Bridges*, V.

CHAPTER THE THIRTY-SECOND.

Of Obstructing Process, and of Disobedience to Orders of Magistrates.

SECTION I.

OF OBSTRUCTING PROCESS.

THE obstructing the execution of lawful process is an offence against public justice, of a very high and presumptuous nature; and more particularly so when the obstruction is of an arrest upon criminal process. So that it has been holden that the party opposing an arrest upon criminal process becomes thereby *particeps criminis;* that is, an accessory in felony, and a principal in high treason. (*a*)

A party opposing an arrest upon criminal process becomes particeps criminis.

Formerly, one of the greatest obstructions to public justice, both of the civil and criminal kind, was the multitude of pretended privileged places, where indigent persons assembled together to shelter themselves from justice (especially in *London* and *Southwark)* under the pretence of their having been ancient palaces of the crown or the like: (*b*) and it was found necessary to abolish the supposed privi-

(*a*) 4 Blac. Com. 128. 2 Hawk. P. C. c. 17. s. 1. where *Hawkins* submits that it is reasonable to understand the books, which seem to contradict this opinion, to intend no more than that it is not felony in the party himself, who is attacked in order to be arrested, to save himself from the arrest by such resistance.

(*b*) The *White Friars*, and its environs, the *Savoy*, and the *Mint*, in *Southwark*, were of this description.

leges and protection of these places by several legislative enactments. The 8 and 9 W. III. c. 27. 9 Geo. I. c. 28. and 11 Geo. I. c. 22. enact, that persons opposing the execution of any process in the pretended privileged places therein mentioned, or abusing any officer in his endeavours to execute his duty therein, so that he receives bodily hurt, shall be guilty of felony, and transported for seven years: and persons in disguise, joining in or abetting any riot or tumult on such account, or opposing any process, or assaulting and abusing any officer executing, or for having executed, the same, are declared to be felons without benefit of clergy. (*c*)

In some proceedings, particularly in those relating to the execution of the revenue laws, (*d*) the legislature has made especial provision for the punishment of those who obstruct officers and persons acting under proper authority. But in ordinary cases, where the offence committed is less than felony, the obstruction of officers in the apprehension of the party will be only a misdemeanor, punishable by fine and imprisonment. (*e*)

The arrest must be lawful to make a party guilty of an obstruction.

It should be observed, that a party will not be guilty of this offence of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful. And in an indictment for this offence it must appear that the arrest was made by proper authority. Thus where an indictment for an assault, false imprisonment, and rescue, stated that the judges of the court of Record of the town and county, &c. of P. issued their writ, directed to T. B. *one of the serjeants at mace* of the said town and county, to arrest W. by virtue of which T. B. was proceeding to arrest W. within the jurisdiction of the said court, but that the defendant assaulted T. B. in the due execution of his office, and prevented the arrest; the court held that it

(*c*) 4 Blac. Com. 128, 129.
(*d*) *Ante*, p. 160. *et sequ.*
(*e*) 2 Chit. Crim. L. 145. note (*a*).

was bad; as it did not appear that T. B. was an officer of the court; a serjeant at mace ex vi termini meaning no more than a person who carries a mace for some one or other. And the court also held, that there could not be judgment, after a *general* verdict on such a count, as for a common assault and false imprisonment; because the jury must be taken to have found that the assault and imprisonment were for the cause therein stated; and that cause appeared to have been the attempt by the officer to make an illegal arrest. (*f*) Lord Ellenborough, C. J. said, "process "ought always to be directed to a proper known officer; "otherwise, if it may be directed to any stranger, it might "be resisted for want of knowledge that the party is an "officer of the court. Then, taking the whole count toge- "ther, the jury in effect find that there was an assault and "imprisonment, but committed under circumstances which "justified the defendant. For if a man, without authority, "attempt to arrest another illegally, it is a breach of the "peace, and any other person may lawfully interfere to "prevent it, doing no more than is necessary for that pur- "pose; and nothing further appears in this case to have "been done." (*g*)

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and disturbance of the peace; for it is an established principle that if one, having a sufficient authority, issue a lawful command, it is not in the power of any other, having an equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. (*h*) The following case upon an indictment for an assault and rescue proceeded upon this principle. Some sheriff's officers having appre-

But where the arrest is lawful, though the execution of it be attended with an affray, even a peace officer must not interpose and obstruct the officer endeavouring to effect it.

(*f*) Rex *v.* Osmer, 5 East. 304.

(*g*) *Id. Ibid.* Judgment was accordingly arrested.

(*h*) 1 East. P. C. c. 5. s. 71. p. 304.

hended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs, having been violently assaulted, struck one of the assailants, a woman; and it was thought for some time that he had killed her; whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts, Heath, J. was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly. (*i*)

Of obstructing process by the rescue of the party arrested.

In cases where the obstruction of process by the rescue of a party arrested is accompanied, as is usually the case, with circumstances of violence and assault upon the officer, the offence may be made the subject of a proceeding by indictment: and, as will be shewn more fully in a subsequent chapter, (*j*) the rescue or attempt to rescue a party arrested on a criminal charge, is usually punished by that mode of proceeding. And the offence of rescuing a person arrested on mesne process, or in execution after judgment, subjects the offender to a writ of rescous, or a general action of trespass *vi et armis*, or an action on the case; in all which damages are recoverable. (*k*) And it has also been the frequent practice of the courts to grant an attachment against such wrongdoers; it being the highest violence

(*i*) Anon. *Exeter* Sum. Ass. 1793. 1 East. P. C. c. 5. s. 71. p. 305.

(*j*) Post. Chap. 35. *Of Rescue, &c.*

(*k*) 6 Bac. Abr. *Rescue* (C.) 6 Com. Dig. *Rescous* (D.)

and contempt that can be offered to the process of the court. (*l*)

Of rescuing goods distrained; and of pound-breach.

It may be mentioned in this place, that the forcibly rescuing goods distrained, and the rescuing cattle by the breach of the pound in which they have been placed, have been considered as offences at common law, and made the subject of indictment. (*m*) It has before been stated, that an indictment will lie for taking goods forcibly, if such taking be proved to be a breach of the peace; (*n*) but, as a mere trespass, without circumstances of violence, is not indictable, (*o*) it has been doubted whether even a pound-breach, which has been considered as a greater offence at common law than a rescue, (*p*) is an indictable offence, if unaccompanied by a breach of the peace. (*q*) But, on the other hand, it has been submitted that, as pound-breach is an injury and insult to public justice, it is indictable *as such* at common law. (*r*) The civil remedy, however, given by the 2 W. and M. c. 5. s. 4. will, in most cases of a pound-breach, or a rescue of goods distrained for rent, be found the most desirable mode of proceeding, where the offenders are responsible persons. That statute enacts that, upon pound-breach, or rescous of goods distrained for rent, the person

(*l*) 6 Bac. Abr. *ibid.* 6 Com. Dig. *Rescous* (D. 6.) But, in order to ground an attachment for a rescue, it seems there must be a *return* of it by the sheriff; at least if it was on an arrest on mesne process, 6 Bac. Abr. *ibid.* 2 Hawk. P. C. c. 22. s. 34. Anon. 6 Mod. 141. And see, as to the return of the rescue by the sheriff, 6 Com. Dig. *Rescous* (D. 4.) (D. 5.) 6 Bac. Abr. *Rescue* (E.) Rex *v.* Belt, 2 Salk. 586. Rex *v.* Elkins, 4 Burr. 2129. Anon. 2 Salk. 586. Rex *v.* Minify, Str. 642. Rex *v.* Ely, 1 Lord Raym. 35. Anon. 1 Salk. 586. 1 Lord Raym. 589.

(*m*) Cro. Circ. Comp. 409. 2 Starkie's Crim. Pl. 617. 2 Chit. Crim. L. 201. precedents of indictments for rescuing goods distrained for rent: and Cro. Circ. Comp. 410. 2 Chit. Crim. L. 204. 206. precedents of indictments for pound-breaches.

(*n*) *Ante*, 70. Anon. 3 Salk. 187.

(*o*) *Ante*, 70.

(*p*) Mirror, c. 2. s. 26.

(*q*) 2 Chit. Crim. L. 204. note (b.) referring to 4 Leon. 12.

(*r*) 2 Chit. Crim. L. 204. note (b.) and the authorities there cited.

grieved shall, in a special action of the case, recover treble damages and costs against the offenders, or against the owner of the goods, if they come to his use. (*s*)

It is laid down in the books that, if a rescue be made upon a distress, &c. for the king, an indictment lies against the rescuer. (*t*) And we have seen that a lessee, resisting with force a distress for rent, or forestalling or rescuing the distress, will be guilty of the offence of a forcible detainer. (*u*)

SECTION II.

OF DISOBEDIENCE TO ORDERS OF MAGISTRATES.

Disobedience to an order of sessions.

DISOBEDIENCE to an order of the justices of the peace at their sessions, made by them in the due exercise of the powers of their jurisdiction, is an indictable offence. Thus, a party has been holden to be guilty of an indictable offence, in disobeying an order of sessions for the maintenance of his grandchildren. (*w*) In this case it was moved, in arrest of judgment, that, as the act of parliament (43 Eliz. c. 2. s. 7.) had annexed a specific penalty, and a particular mode of proceeding, the course prescribed by the act ought to have been adopted, and that there could be no proceeding by indictment: but, after able argument, and great deliberation, the court were of opinion that the prosecutor was at liberty to proceed at common law, or in the method prescribed by the statute; and that there could be no doubt but that an indictment would lie at common law, for disobedience to an order of sessions. (*x*)

(*s*) See as to the proceedings upon this statute, Bradby on Distresses, 282. *et sequ.* 6 Bac. Abr. Rescue (C.)

(*t*) F. N. B. 102. G. 6 Com. Dig. *Rescous*, (D. 3.)

(*u*) *Ante*, 417.

(*w*) Rex *v.* Robinson, 2 Burr. 799, 800.

(*x*) *Id. ibid.* See the principles upon which this decision proceeded *ante*, 65. *et sequ.*

Upon the same principle it was holden that, where an act of parliament gave power to the king in council to make a certain order, and did not annex any specific punishment to the disobeying it, such disobedience was an indictable offence, punishable as a misdemeanor at common law. (*y*)

Disobedience to an order of council.

Disobeying an order of one or more justices, when duly made, is also a common law offence, and therefore punishable by indictment. (*z*) Thus, it has been holden to be an indictable offence to disobey an order of justices directing a highway to be widened, under the 13 Geo. III. c. 78. (*a*) And it seems that an indictment will lie for disobedience to an order of justices placing out an apprentice pursuant to the statute, when such disobedience is either by not receiving, turning off, or not providing for such apprentice. (*b*) So a power to remove a pauper being given to two justices, by the 13 and 14 Car. II. c. 12. the not removing him is a disobedience of that statute for which an indictment will lie. (*c*) And, by Foster, J. "In all cases where a justice has power "given him to make an order, and direct it to an inferior "ministerial officer, and he disobeys it, if there be no particular remedy prescribed, it is indictable." (*d*)

Disobedience to an order of justices.

Where such an order is made, any person mentioned in it, and required to act under it, should, upon its being duly served upon him, lend his aid to carry it into effect. Thus where, upon a complaint made by an excluded member of a friendly society, two persons, A. and B. the then stewards of the society, were summoned, and an order made by two justices that such stewards and the other members of the

Every person required by an order to do any act, should lend his aid to carry it into effect.

(*y*) Rex *v.* Harris, 4 T. R. 202. 1 Leach, 155. *Ante*, 156 note (*h.*)

(*z*) Rex *v.* Balme, Cowp. 650. Rex *v.* Fearnley, 1 T. R. 316.

(*a*) *Id. ibid.*

(*b*) Reg. *v.* Gould, 1 Salk. 381. 2 Nol. c. 33. s. 3.

(*c*) Rex *v.* Davis, 1 Bott. 338. Say. 163. 4 Burn. Just. *Poor.* Sect. XIX. 2. i.

(*d*) 4 Burn. Just. *ibid.*

society, should forthwith reinstate the complainant; it was holden, that though this order was not served upon A. and B. until they had ceased to be stewards, yet it was still obligatory upon them, as members of the society, to *attempt* to reinstate the complainant; and that their having ceased to be stewards was no justification of entire neglect on their part. (*e*) Lord Ellenborough C. J. said, at the trial, "The "order is not confined to the stewards alone, but is made "upon all the members of the society; and the defendants "were members of the society independently of their being "stewards, and were bound, as members, to see that the "order was obeyed; or, at least, to have taken some steps "for that purpose. As members, they might have done "something; as stewards indeed, they might, with greater "facility, have inforced obedience to the order; but each "member had it in his power to lend some aid for the at-"tainment of that object." And when in the ensuing term a motion was made that a verdict might be entered for the defendants, on the ground that, having ceased to be stewards when the notice was served, they had not been guilty of a criminal default; the court said, that if the defendants had shewn that they did every thing in their power to restore the party, in obedience to the order, they might have given it in evidence by way of excuse. (*f*)

The order should be personally served.

There must be personal service of an order on all persons who are charged with a contempt of it: and it was held, upon demurrer, to be a decisive objection to an indictment for a disobedience and contempt of an order of sessions,

(*e*) Rex *v.* Gash and another, 1 Starkie 111.

(*f*) *Id. Ibid.* The motion was also made on another ground; namely, a defect in the jurisdiction of the magistrates: two magistrates of the county of *Middlesex*, where the meetings of the society were held, having made the order, though the society had been originally established in *London*, and its rules enrolled at the sessions for *London*. But the court decided that the magistrates of *Middlesex* had jurisdiction. See 33 Geo. III. c. 51. and 49 Geo. III. c. 125. s. 1.

that it charged a contempt by six persons of an order which was only stated to have been served on four of them. (*g*)

Of the indictment.

It appears to have been holden not to be necessary, in an indictment against a public officer for disobedience of orders, to aver that the orders have not been revoked; for the orders, being stated to have been given by those who were empowered by certain statutes to give them, must be taken to remain in force until they were revoked or contradicted. (*h*) But an indictment for disobeying an order of justices must shew explicitly that an order was made; and it is not sufficient to state the order by way of recital. (*i*) It is said to be more safe to aver that the defendant was requested to comply with the terms of the order. (*k*) But if the statement of the order having been served on all the defendants (which, as has been before observed, is a necessary statement) be omitted, the want of such an allegation will not be supplied by averring that they were all requested to perform the duties required by the order. (*l*)

Legality of conviction cannot be inquired into on motion in arrest of judgment.

On a motion to arrest the judgment upon an indictment for disobeying an order of justices for the payment of a fine upon a conviction, the court of King's Bench refused to hear any objections to the conviction which did not appear upon the face of it. (*m*)

33 Geo. III. c. 55. s. 1.

Before this subject is concluded, it may be proper, shortly,

(*g*) Rex *v.* Kingston and others, 8 East. 41.

(*h*) Rex *v.* Holland, 5 T. R. 607. 624., a case of an indictment against the defendant for malversations in office while he was one of the council at *Madras*.

(*i*) Rex *v.* Crowhurst, 2 Lord Raym. 1363.

(*k*) 2 Chit. Crim. L. 279. note (g.) citing 1 T. R. 316. which is the case of Rex *v.* Fearnly, where an objection was taken to an indictment that it did not contain such statement; but the court did not find it necessary to give any opinion upon the point.

(*l*) Rex *v.* Kingston and others, 8 East. 41, 53.

(*m*) Rex *v* Mitton, 3 Esp. R. 200. in the note.

gives a power to justices, at a petty sessions, to impose fines upon constables, &c. for neglect of duty, and disobedience to orders of justices.

to notice the statute 33 Geo. III. c. 55. s. 1. which gives power to justices of the peace assembled at any special or petty sessions, upon complaint upon oath of any neglect of duty, or of any disobedience of any lawful warrant, or order of any justice or justices of the peace, by any constable, overseer of the poor, or other peace or parish officer, (such constable, &c. having been duly summoned) to impose, upon conviction, any reasonable fine or fines, not exceeding forty shillings; and, by warrant under the hands and seals of any two or more of such justices so assembled, to direct the fines to be levied by distress and sale of the offender's goods. And it is provided, that any person aggrieved by such fine, warrant, &c. may appeal to the next quarter sessions; giving, at least, ten days' notice.

CHAPTER THE THIRTY-THIRD.

Of Escapes.

AN escape is, where one who is arrested gains his liberty before he is delivered by the course of the law. (*a*) And it may be by the party himself; either without force before he is put in hold, or with force after he is restrained of his liberty; or it may be by others; and this also either without force, by their permission or negligence, or with force, by the rescuing of the party from custody. Where the liberation of the party is effected either by himself or others, without force, it is more properly called an *escape;* where it is effected by the party himself, with force, it is called *prison breaking;* and where it is effected by others, with force, it is commonly called a *rescue.* (*b*) In the present chapter it is proposed to consider of those acts without force, which more properly come under the title of *escape.*

Of an escape by the party himself.

There is little worthy of remark in the books respecting an escape effected by the party himself, without force: but the general principle appears to be, that, as all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it, those who, declining to undergo a legal imprisonment when arrested on criminal process, free themselves from it by any artifice, and elude the vigilance of their keepers, before they are put in hold, are guilty of an offence in the nature of a high contempt, and punishable by fine and imprisonment. (*c*) And it is also criminal in a prisoner to escape from lawful confine-

(*a*) *Terms de la ley.*

(*b*) 1 Hale 590. 2 Hawk. P. C. c. 17, 18, 19, 20, 21. 4 Blac. Com. 129.

(*c*) 2 Hawk. P. C. c. 17. s. 5.

ment, though no force or artifice be used on his part to effect such purpose. Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the consent or negligence of the gaoler, or if he escape in any other manner, without using any kind of force or violence, he will be guilty of a misdemeanor; and if his prison be broken by others, without his procurement or consent, and he escape through the breach so made, he may be indicted for the escape. (*d*)

Persons escaping from Great Britain to Ireland, or from Ireland to Great Britain, to be apprehended and brought back again.

It may be here mentioned that, by a late statute, 44 Geo. III. c. 92. s. 3. offenders, against whom any warrant shall be issued, escaping from *Ireland* into *England*, or *Scotland*, may be apprehended by an indorsed warrant, and conveyed to *Ireland:* and the fourth section of the act makes the same provision as to offenders escaping from *England* or *Scotland* into *Ireland*, being apprehended and conveyed back again to *England* or *Scotland*. (*e*)

Escapes effected or, perhaps more properly, suffered by others than the party himself, without force, by permission or negligence, may be either, I. by officers; or, II. by private persons.

SECTION I.

OF ESCAPES SUFFERED BY OFFICERS.

An escape of this kind must be from a justifiable imprisonment for a criminal matter, after an actual arrest.

(*d*) 1 Hale 611. 2 Inst. 589, 590. Summ. 108. Staund. P. C. 30, 31, 2 Hawk. P. C. c. 18. s. 9, 10.

(*e*) And see as to the apprehension of persons escaping from England into Scotland, and from Scotland into England, 13 Geo. III. c. 31. And as to the admitting persons apprehended in England, Scotland, and Ireland, respectively, to bail, for bailable offences, see 45 Geo. III. c. 92. and 54 Geo. III. c. 186.

As there must be an *actual arrest*, it has been holden, that if an officer, having a warrant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape. (*f*)

The escape must be after an actual arrest.

The arrest and imprisonment must be justifiable; for, if a party be arrested for a supposed crime, where no such crime was committed, and the party neither indicted nor appealed, or for such a slight suspicion of an actual crime and by such an irregular mittimus as will neither justify the arrest nor imprisonment, the officer is not guilty of an escape by suffering the prisoner to go at large. (*g*) But it seems that if a warrant of commitment plainly and expressly charge the party with treason or felony, though it be not strictly formal, the gaoler, suffering an escape, is punishable; and that where commitments are good in substance, the gaoler is as much bound to observe them as if they were made ever so exactly. (*h*) It is stated as a good general rule upon this subject that, whenever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape. (*i*)

And the arrest and imprisonment must be justifiable.

The imprisonment must not only be justifiable, but also for some *criminal matter*. But the escape of one committed for petit larceny only is criminal; and it seems most agreeable to the general reason of the law that the escape of a person committed for any other crime whatsoever should also be criminal. (*j*) The imprisonment must also be *continuing* at the time of the escape; and its continuance must be grounded on that satisfaction which the public justice demands for the crime committed. So that if a prisoner be

The imprisonment must be for a criminal matter, and continuing at the time of the escape.

(*f*) 2 Hawk. P. C. c. 19. s. 1.

(*g*) *Id. Ibid.* s. 2.

(*h*) 2 Hawk. P. C. c. 19. s. 24. A commitment to a *prison*, and not to a *person*, was held good in Rex *v.* Fell, 1 Lord Raym. 424.

(*i*) *Id. Ibid.* s. 2. And see *post*, Chap. 34.

(*j*) 2 Hawk. P. C. c. 19. s. 3. 1 Hale 592.

acquitted, and detained only for his fees, it will not be criminal to suffer him to escape, though the judgment were that he should be discharged, "paying his fees;" he being in such case detained only as a debtor: but if a person, convicted of a crime, be condemned to imprisonment for a certain time, and also "*until* he pays his fees," it is said that perhaps an escape of such person, after the time of his imprisonment is elapsed, without paying his fees, may be criminal; as it was part of the punishment that the imprisonment should be continued till the fees should be paid. (*k*)

Escapes may be voluntary or negligent.

The next important enquiry upon this subject will be, whether the escape be *voluntary* or *negligent*, as the former is an offence of a much more serious nature than that which may have been committed by negligence.

Of voluntary escapes.

Whenever an officer, having the custody of a prisoner charged with, and guilty of, a capital offence, knowingly gives him his liberty with an intent to save him either from his trial or execution, such officer is guilty of a *voluntary escape*, and thereby involved in the guilt of the same crime of which the prisoner is guilty, and for which he was in custody. (*l*) *Hawkins* says, that it seems to be the opinion of *Sir Matthew Hale*, (*m*) that in some cases an officer may be adjudged guilty of a voluntary escape who had no such intent to save the prisoner, but meant only to give him a liberty which, by law, he had no colour of right to give; as if a gaoler should bail a prisoner who is not bailable: but he withholds his assent to that opinion, on the grounds that it is not sufficiently supported by authorities, and does

(*k*) 2 Hawk. P. C. c. 19. s. 4. This seems to be a good reason: but Hawkins says that it is to be intended only where the fees are due to others as well as to the gaoler; for, otherwise, the gaoler would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only in the non-payment of a debt in his power to release.

(*l*) Staund. P. C. 33. 2 Hawk. P. C. c. 19. s. 10. 4 Blac. Com. 129.

(*m*) Sum. 113. 1 Hale 596, 597.

not seem to accord with the purview of a statute 5 Edw. III. c. 8. relating to the improper bailing of persons by the marshals of the King's Bench. (*n*) He says also, that it seems to be agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; and that there are some cases wherein an officer seems to have been found to have knowingly given his prisoner more liberty than he ought to have had, (as by allowing him to go out of prison on a promise to return; or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen) and yet seems to have been only adjudged guilty of a negligent escape. (*o*) And he concludes by saying, that if, in these cases, the officer were only guilty of a negligent escape, in suffering the prisoner to go out of the limits of the prison, without any security for his return, he could not have been guilty in a higher degree if he had taken bail for his return; and that from thence it seems reasonable to infer that it cannot be, in all cases, a general rule that an officer is guilty of a voluntary escape by bailing his prisoner, whom he has no power to bail, but that the judgment to be made of all offences of this kind must depend upon the circumstances of the case: such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted. (*p*)

It appears to have been holden, that it is an escape in a constable to discharge a person committed to his custody by

(*n*) *Post*, 542, 543.

(*o*) Hawkins says, however, that it must be confessed that, in these cases, the prisoner was only accused of larceny, and that it does not appear whether he were bailable or not; and that, generally, the old cases concerning this subject are so very briefly reported that it is very difficult to make an exact state of the matter from them.

(*p*) 2 Hawk. P. C. c. 19. s. 10.

a watchman as a loose and disorderly woman, and a street walker, although no positive charge was made. (*q*)

Of negligent escapes.

A *negligent* escape is where the party arrested or imprisoned escapes against the will of him that arrests or imprisons him, and is not freshly pursued and taken again before he has been lost sight of. (*r*) And, from the instances of this offence mentioned in the books, it seems that where a party so escapes the law will presume negligence in the officer. Thus if a person in custody on a charge of larceny suddenly, and without the assent of the constable, kill, hang, or drown himself, this is considered as a negligent escape in the constable. (*s*) And if a prisoner charged with felony break a gaol, it is said that this seems to be a negligent escape; because there wanted either the due strength in the gaol that should have secured him, or the due vigilance in the gaoler or his officers that should have prevented it. (*t*) But it is submitted that it would be competent to a person charged with a negligent escape under such circumstances to shew in his defence that all due vigilance was used, and that the gaol

(*q*) Rex *v.* Bootie, 2 Burr. 864.

(*r*) Dalt. c. 159. 1 Burn. Just. *Escape* IV.

(*s*) Dalt. c. 159.

(*t*) 1 Hale 600. where it is said that "therefore it is lawful for the "gaoler to hamper them with "irons, to prevent their escape." But see the note (*a*) *ibid.* where it is said that this liberty can only be intended where the officer has just reason to fear an escape, as where the prisoner is unruly, or makes any attempt for that purpose; but that otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbid to put their prisoners to any pain or torment; Co. P. C. 34, 35. *Custodes gaolarum pœnam sibi commissis non augeant, nec eos torqueant vel redimant, sed omni sævitiâ remotâ pietateque adhibitâ judicia debite exequantur.* Flet. Lib. I. cap. 26. And the *Mirror* of Justices, Ch. 5. s. 1. n. 54. says, that it is an abuse that prisoners should be charged with irons, or put to any pain, before they be attainted of felony: and Lord *Coke*, in his comment on the statute of Westm. 2. ch. 11. is express, that by the common law it might not be done. 2 Inst. 381.

was so constructed as to have been considered by persons of competent judgment a place of perfect security. Undoubtedly an escape happening from defects in these particulars would come within the principle of guilty negligence in those concerned in the proper custody of the criminal; and neglect in not keeping gaols in a proper state of repair, by those who are liable to the burthen of repairing them, appears in many instances to have been treated as an indictable offence, tending to the great hindrance and obstruction of justice. (*u*)

Negligent escape by admitting to bail.

A person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable. Thus if a justice of peace bails a person not bailable by law it excuses the gaoler, and is not felony in the justice, but a negligent escape, for which he is fineable at common law, and by the justices of gaol delivery. (*w*) It is laid down as clear law, that whoever *de facto* occupies the office of gaoler is liable to answer for a *negligent escape*, and that it is in no way material whether or not his title to the office be legal. (*x*) But a case is reported where, upon an indictment against a yeoman wardour of the Tower and the gentleman gaoler there, for a negligent escape of a prisoner, who had been committed to the Tower on a charge of high treason, and consigned to the care of the defendants by the constable of the Tower, to be kept in the house of the wardour, the court held, that the defendants were not such officers as the law took notice of, and therefore could not be guilty of a negligent escape; and that it was merely a breach of trust to the constable of the Tower, their master. (*y*) And upon

(*u*) See the precedents of indictments for this offence, 4 Wentw. 363. Cro. Circ. Comp. 318. Cro. Circ. Ass. 398. 3 Chit. Crim. L. 668, 669.

(*w*) At common law, according to 25 Edw. III. 39. (in the last edition of the year books mispaged 25 Edw. III. 82. a.) and by the justices of gaol delivery, by the statute 1 and 2 Ph. and M. c. 13. See 1 Hale 596. and as to escapes by admitting to bail or to improper liberty, *ante*, 532. 533.

(*x*) 2 Hawk. P. C. c. 19. s. 28.

(*y*) Hill and Dod, (case of) Old

the same principle another wardour of the Tower appears also to have been acquitted of a negligent escape. (*z*) It appears, however, that a sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; that the court may charge either the sheriff or bailiff for such an escape; and that if a deputy gaoler be not sufficient to answer a negligent escape, his principal must answer for him. (*a*)

Of retaking a prisoner.

The difference between a voluntary and negligent escape will also require to be attended to in considering the effect of the *re-taking* of a prisoner after he has been suffered to escape.

After a voluntary escape.

When an officer has *voluntarily* suffered a prisoner to escape, it is said that he can no more justify the re-taking him than if he had never had him in custody before; because, by his own free consent, he hath admitted that he hath nothing to do with him: but if the party return, and put himself again under the custody of the officer, it seems that it may probably be argued that the officer may lawfully detain him, and bring him before a justice in pursuance of the warrant. (*b*)

After a negligent escape.

It seems to be clearly agreed by all the books that an officer making fresh pursuit after a prisoner, who has escaped through his *negligence*, may retake him at any time afterwards, whether he find him in the same, or a different county: and it is said generally in some books, that an officer, who has negligently suffered a prisoner to escape,

Bailey, *Jan.* 1694, 1 Burn. Just. *Escape*, III. p. 715. (21st ed.)

(*z*) Stick's case, Old Bailey, *Jan.* 1694, 1 Burn. Just. *Id. Ibid.*

(*a*) 2 Hawk. P. C. c. 19. s. 29. and Rex *v.* Fell, 1 Lord Raym. 424. 2 Salk. 272. Hawkins says, "But "if the gaoler who suffers an escape have an estate for life or "years in the office, I do not find "it agreed how far he in reversion "is liable to be punished."

(*b*) 2 Hawk. P. C. c. 19. s. 12. c. 13. s. 9. Dalt. c. 169. 1 Burn. Just. *Escape.*

may retake him, wherever he finds him, without mentioning any fresh pursuit; and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason why he should have any manner of advantage from it. (*c*) If the officer pursue a prisoner, who flies from him, so closely as to retake him without losing sight of him, the law regards the prisoner as being so much in his power all the time as not to adjudge such flight to amount to an escape: but if the officer once lose sight of the prisoner, it seems to be the better opinion that he will be guilty of a negligent escape, though he should retake him immediately afterwards. (*d*) And if he has been fined for the offence, it is clear that he will not avoid the judgment of his fine by re-taking the prisoner. (*e*) And it is also clear that he cannot excuse himself by killing a prisoner in the pursuit, though he could not possibly retake him; but must, in such case, be content to submit to such fine as his negligence shall appear to deserve. (*f*)

Proceedings by presentment or indictment, or by a more summary course.

The proceedings against persons charged with having suffered escapes must in general be by presentment or indictment, or they may be by information. (*g*)

But where persons present in a court of record are committed to prison by such court, the keeper of the gaol, as he is bound to have them always ready to produce when called for, if he fail to produce them, will be adjudged guilty of an escape, without further enquiry; unless he have some reasonable matter to allege in his excuse; as that the prison was set on fire, or broken open by enemies, &c. for he will

(*c*) 2 Hawk. P. C. c. 19. s. 12.

(*d*) Staundf. P. C. 33. 1 Hale 602. 2 Hawk. P. C. c. 19. s. 6. 13.

(*e*) 2 Hawk. P. C. c. 19. s. 12, 13.

(*f*) Staundf. P. C. 33. 1 Hawk. P. C. c. 28. s. 11, 12. 2 Hawk. P. C. c. 19. s. 6. 13.

(*g*) Gaoler of Shrewsbury's case, 1 Str. 532. where the court refused to grant an attachment against the gaoler for a voluntary escape of one in execution for obstructing an excise officer in the execution of his office, but ordered him to shew cause why there should not be an information.

be concluded by the record of the commitment from denying that the prisoners were in his custody. (*h*) And some have holden, (*i*) that if a gaoler say nothing in excuse of such an escape, it shall be adjudged voluntary; but it seems difficult to maintain that where it stands indifferent whether an escape be negligent or voluntary, it ought to be adjudged a crime of so high a nature, without a previous trial. (*k*) With respect to other prisoners not committed in such manner, but in the custody of a gaoler or other person by any other means whatsoever, it seems to be agreed that the person who had them in custody is in no case punishable for an escape, until it be presented. (*l*) But it is laid down as a rule that though, where an escape is fineable, the presentment of it is traversable; yet that where the offence is amerciable only, there the presentment is of itself conclusive; such amerciaments being reckoned amongst those *minima de quibus non curat lex*: (*m*) and this distinction is said to be well warranted by the old books. (*n*)

It should be observed that it is laid down in the books that a person who has suffered another to escape cannot be arraigned for such escape as for felony, until the principal be attainted; on the ground that he is only punishable in this degree as an accessory to the felony, and that the general rule is, that no accessory ought to be tried until the principal be attainted; (*o*) but that he may be indicted and

(*h*) 2 Hawk. P. C. c. 19. s. 15.

(*i*) Staundf. P. C. 34. 1 Hale 599. 603.

(*k*) 2 Hawk. P. C. c. 19. s. 15.

(*l*) 2 Hawk. P. C. c. 19. s. 16.

(*m*) Staundf. P. C. c. 32. p. 36.

(*n*) 2 Hawk. P. C. c. 19. s. 21. and see *post*, 542. as to escapes fineable or amerciable.

(*o*) See *ante*, 51. *et sequ.* By the 1 Ann. st. 2. c. 9. an accessory may be tried where the principal offender has been *convicted*, &c. though not *attainted*. *Ante*, p. 53. In the Cro. Circ. Ass. 338. is an indictment as for a misdemeanor against a gaoler, for wilfully permitting a prisoner to escape who was under sentence of imprisonment for the term of six months, *after a conviction of grand larceny*: but it seems that it ought to have been laid as a felony. See 2 Starkie, Crim. Plead. 600. note (*b*) referring to Rex v. Burridge, 3 P. Wms. 497.

tried for a misprision before any attainder of the principal offender; for whether such offender were guilty or innocent, it was a high contempt to suffer him to escape. If, however, the commitment were for high treason, and the person committed actually guilty of it, it is said that the escape is immediately punishable as high treason also, whether the party escaping be ever convicted of such crime or not; and the reason given is, that there are no accessories in high treason. (*o*)

Of the indictment for an escape.

Every indictment for an escape, whether negligent or voluntary, must expressly shew that the party was actually in the defendant's custody for some crime, or upon some commitment upon suspicion; (*p*) and judgment was arrested upon an indictment, which stated that the prisoner was in the defendant's custody, and charged with a certain crime, but did not state that he was committed for that crime; for a person in custody may be charged with a crime, and yet not be in custody by reason of such charge. (*q*) But where a person was committed to the custody of a constable by a watchman as a loose and disorderly woman, and a street walker, it was holden, upon an indictment against the constable for discharging her, that by an allegation of his being charged with her "*so being* such loose, &c." it was sufficiently averred that he was charged with her "*as* such loose, &c." and it was also holden not to be necessary to aver that the defendant knew the woman to be a street walker. (*r*) And every indictment should also shew that the prisoner went at large: (*s*) and also the time when the offence was committed for which the party was in custody; not only that it may appear that it was prior to the escape, but also that it was subsequent to the last general par-

(*o*) 2 Hawk. P. C. c. 19. s. 26.

(*p*) 2 Hawk. P. C. c. 19. s. 14.

(*q*) Rex *v.* Fell, 1 Lord Raym. 424. 2 Salk. 272.

(*r*) Rex *v.* Bootie, 2 Burr. 864. and see as to the sufficiency of such averments, Rex *v.* Boyall, 2 Burr. 832.

(*s*) 2 Hawk. P. C. c. 19. s. 14. where it is said that this is most properly expressed by the words *exivit ad largum*.

don. (*t*) If the indictment be for a voluntary escape, it must allege that the defendant feloniously and voluntarily permitted the prisoner to go at large; (*u*) and must also shew the species of crime for which the party was imprisoned; for it will not be sufficient to say, in general, that he was in custody for felony, &c. (*w*) But it is questionable whether such certainty, as to the nature of the crime, be necessary in an indictment for a negligent escape; as it is not in such case material whether the person who escaped were guilty or not. (*x*)

Of the trial.

By the statute *Westminster* 1. c. 3. the proceedings and trial for the offence of an escape were to be had before the justices in eyre: but it was adjudged that the jurisdiction of the court of King's Bench was not restrained by that statute, that court being itself the highest court of eyre. (*y*) The 31 Edw. III. c. 14. enacts, that the escape of thieves and felons, and the chattels of felons, &c. from thenceforth to be judged before *any of the king's justices*, shall be levied from time to time, &c. by which it seems to be implied that other justices, as well as those in eyre, may take cognizance of escapes: and it is certain that justices of gaol delivery may punish justices of peace for a negligent escape, in admitting persons to bail who are not bailable. (*z*) The 1 Rich. III. c. 3. enacts, that justices of peace shall have authority to enquire in their sessions of all manner of escapes of every person arrested and imprisoned for felony.

Punishment.

In considering of the punishment for this offence, it will

(*t*) 2 Hawk. P. C. c. 19. s. 14. But upon an indictment for an escape the court will not intend a pardon; it must be shewn by the defendant, by way of excuse. Rex v. Fell, 1 Lord Raym. 424.

(*u*) *Felonicè et voluntarie A. B. ad largum ire permisit.*

(*w*) 2 Hawk. P. C. c. 19. s. 14.

(*x*) *Id. Ibid.*

(*y*) Staundf. P. C. c. 32. p. 35. *Eo que le banke le roy est un eire, & plus haut que un eire, car si le eire sea in un county, et le banke le roy veigne la, le eire cessera.*

(*z*) 2 Hawk. P. C. c. 19. s. 19. *ante*, 535.

be necessary again to attend to the distinction between a voluntary and negligent escape.

In cases of voluntary escape.

It seems to be generally agreed that a *voluntary escape* amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; whether the person escaping were actually committed to some gaol, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime, and neither indicted nor appealed. (*a*) But the voluntary escape of a felon will be within the benefit of clergy, though the felony for which the party was in custody be ousted. (*b*) An escape suffered by one who wrongfully takes upon him the keeping of a gaol seems to be punishable in the same manner as if he were rightfully entitled to the custody; for the crime is in both cases of the same ill consequence to the public. (*c*) But no one is punishable in this degree for a voluntary escape but the person who is actually guilty of it: therefore the principal gaoler is only fineable for a voluntary escape suffered by his deputy. (*d*) One voluntary escape is said to amount to a forfeiture of a gaoler's office (*e*)

No escape will amount to a capital offence unless the cause for which the party was committed were actually such at the time of the escape: its becoming a capital offence afterwards, as by the death of a party wounded at the time of the escape, but not then dead, will not be sufficient. (*f*)

Of the punishment in cases

Whenever a person is found guilty upon an indictment,

(*a*) 2 Hawk. P. C. c. 19. s. 22. And it is said to be no excuse of such escape that the prisoner had been acquitted on an indictment of death, and only committed till the year and day should be passed, to give the widow or heir an opportunity of bringing their appeal. *Id.* *Ibid.*

(*b*) 1 Hale 599.

(*c*) 2 Hawk. P. C. c. 19. s. 23.

(*d*) Rex *v.* Fell, 1 Lord Raym. 424. 2 Salk. 272. 1 Hale 597, 598.

(*e*) 2 Hawk. P. C. c. 19. s. 30.

(*f*) 2 Hawk. P. C. c. 19. s. 25.

of negligent escapes.

or presentment of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum, to be paid to the king as a *fine*. (*g*) And it seems that by the common law the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds, and for suffering such escape of a person indicted, and not attainted, five pounds; and that if the person escaping were neither attainted nor indicted, it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper. And it seems also, that if the party had escaped twice, these penalties were of course to be doubled: but that the forfeiture was no greater for suffering a prisoner to escape who had been committed on two several accusations, than if he had been committed but on one. (*h*) It is the better opinion that one negligent escape will not amount to a forfeiture of a gaoler's office; yet if a gaoler suffer many negligent escapes, it is said that he puts it in the power of the court to oust him of his office at discretion. (*i*)

Punishment of negligent escapes by statutes.

Some regulations by statutes respecting the punishment of negligent escapes should also be noticed.

5 Edw. III. c. 8. as to the marshals of the King's Bench.

The 5 Edw. III. c. 8. recites, that persons indicted of felonies had removed the indictments before the king, and there yielded themselves, and had been incontinently let to bail by the marshals of the King's Bench; and enacts, that such persons shall be safely and surely kept in prison: and (after providing for the manner of such confinement, &c.) further enacts, that if any such prisoner be found wandering

(*g*) 2 Hawk. P. C. c. 19. s. 31. where the author says, "it seems "most properly to be called a fine. "But this does not clearly appear "from the old books; for in some "of them it seems to be taken as "a *fine*, in others as an *amercia-* "*ment*, and in others it is spoken "of generally as the imposition of "a certain sum, and without any "mention of either fine or amer- "ciament."

(*h*) 2 Hawk. P. C. c. 19. s. 33.

(*i*) 2 Hawk. P. C. c. 19. s. 30.

out of prison by bail or without bail, the marshal being found guilty, shall have a year's imprisonment, and be ransomed at the king's will.

56 Geo. III. c. 63. as to persons having the custody of convicts in the general penitentiary.

The statute 56 G. III. c. 63. which was passed for regulating the general Penitentiary for convicts at Milbank, enacts, that if any person having custody of any convict, or being employed by the person having such custody, in the manner mentioned in the act, shall negligently permit any such convict to escape; such person so permitting shall be guilty of a misdemeanor; and being lawfully convicted shall be liable to fine or imprisonment, or to both, at the discretion of the court. (*k*)

It has been holden, that a negligent escape may be pardoned by the king before it happens, but that a voluntary one cannot be so pardoned. (*l*) Upon an indictment for an escape the court will not intend a pardon; but it must be shewn by the defendant by way of excuse. (*m*)

SECTION II.

OF ESCAPES SUFFERED BY PRIVATE PERSONS.

THE law with respect to escapes suffered by private persons is in general the same as in relation to those suffered by officers: it will be sufficient, therefore, to mention shortly

(*k*) 56 Geo. III. c. 63. s. 44. And by s. 45. in any prosecution against any person concerned in the escape, &c. or aiding, &c. a copy properly attested of the order of commitment to the Penitentiary is made evidence that the person in question was so ordered to confinement, after proof that such person is the same that was delivered with the order.

(*l*) 2 Hawk. P. C. c. 19. s. 32.

(*m*) Rex *v.* Fell, 1 Lord Raym. 424.

the circumstances under which it is considered that a private person may be guilty of an escape, and the punishment to which he will be liable.

In what cases a private person will be guilty of an escape.

It seems to be a good general rule, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he has discharged himself, by delivering him over to some other who by law ought to have the custody of him. And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person, who receives him and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted with him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought, at his peril, to have taken care of him. (*n*)

But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer, as the sheriff, or his bailiff, or a constable, from whose custody the prisoner escapes, he will not be chargeable. He cannot, however, excuse himself from the escape by alleging that he delivered the prisoner over to an officer, without shewing to whom, in particular, by name, he so delivered him, that the court may certainly know who is answerable. (*o*)

(*n*) 2 Hawk. P. C. c. 20. s. 1, 2. 1 Hale 595. Sum. 112.

(*o*) 2 Hawk. P. C. c. 20. s. 3, 4. 1 Hale 594, 595. Staund. P. C. 34. Sum. 112. 114. Hawkins, *id.* s. 4. says, that if no officer will receive such prisoner into his custody, it seems to be the safest way to deliver him into the custody of the township where the person who arrested him lives, or perhaps of that where the arrest was made, which shall be bound to keep him till the next gaol delivery: but he says, "If such township refuse also to "receive him, I do not see how "the person who made the arrest "can discharge himself of him be-

If an escape suffered by a private person were voluntary, he is punishable as an officer would be for the same offence; (*p*) and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court. (*q*)

Punishment of private persons for escapes.

" fore the next gaol delivery; un-
" less he can, in the mean time,
" procure him to be bailed."

(*p*) *Ante*, 541.

(*q*) 2 Hawk. P. C. c. 20. s. 6.

CHAPTER THE THIRTY-FOURTH.

OF PRISON-BREAKING BY THE PARTY CONFINED.

Offence at common law.

WHERE a party effects his own escape by force, the offence is usually called *prison-breaking:* and such breach of prison, or even the conspiring to break it, was felony at the common law, for whatever cause, criminal or civil, the party was lawfully imprisoned; (*a*) and whether he were actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him. (*b*) But the severity of the common law is mitigated by the statute *de frangentibus prisonam*, 1 Edw. II. stat. 2., which enacts, "That none, from henceforth, that breaketh "prison, shall have judgment of life, or member, for breaking of prison only; except the cause for which he was "taken and imprisoned did require such a judgment, if he "had been convict thereupon, according to the law and "custom of the realm." Thus, though to break prison and escape, when lawfully committed for any treason or felony, remains still felony as at common law; to break prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor, by fine and imprisonment. (*c*)

Construction of 1 Edw. II. st. 2.

It will be proper to consider some of the points which have been holden in the construction of this statute.

What is a *prison* within the statute.

Any place whatsoever wherein a person, under a lawful arrest for a supposed crime, is restrained of his liberty,

(*a*) 4 Blac. Com. 129. 1 Hale 607. Bract. l. 3. c. 9. 2 Inst. 588.

(*b*) 2 Hawk. P. C. c. 18. s. 1.

(*c*) 4 Blac. Com. 130.

whether in the stocks, or the street, or in the common gaol, or the house of a constable or private person, or the prison of the ordinary, is properly a *prison* within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty. (*d*) The statute, therefore, extends as well to a prison in law as to a prison in deed. (*e*)

Of the regularity of the imprisonment.

With respect to the regularity of the imprisonment, it is clear that if a person be taken upon a *capias*, awarded on an indictment or appeal against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record, which makes his commitment lawful, however he may be innocent, or the prosecution groundless. And if an innocent person be committed by a lawful *mittimus*, on such a suspicion of felony, actually done by some other, as will justify his imprisonment, though he be neither indicted nor appealed, he is within the statute if he break the prison; for he was legally in custody, and ought to have submitted to it until he had been discharged by due course of law. (*f*)

But if no felony at all were done, and the party be neither indicted nor appealed, no *mittimus* for such a supposed crime will make him guilty within the statute, by breaking the prison; his imprisonment being unjustifiable. And though a felony were done, yet, if there were no just cause of suspicion either to arrest or commit the party, his breaking the prison will not be felony if the *mittimus* be not in such form as the law requires; because the lawfulness of his imprisonment, in such case, depends wholly on the *mittimus:* but if the party were taken up for such strong causes of suspicion as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison,

(*d*) 2 Hawk. P. C. c. 18. s. 4. 2 Inst. 590. Sum. 109. 1 Hale 610, 611.
(*e*) 2 Inst. 589.
(*f*) 2 Hawk. P. C. c. 18. s. 5, 6.

though he happen to have been committed by an informal warrant. (*g*)

Of the nature of the crime for which the party is imprisoned.

The next enquiry will be as to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the statute. It is clear that the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent. (*h*) Though an offender breaking prison, while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment. (*i*) But it is not material whether the offence for which the party was imprisoned were capital at the time of the passing of the statute, or were made so by subsequent statutes; for, since all breaches of prison were felonies by the common law, which is restrained by the statute only in respect of imprisonment for offences not capital, when an offence becomes capital, it is as much out of the benefit of the statute as if it had always been so. (*k*)

If the crime for which the party is arrested, and with which he is charged in the *mittimus*, do not require judgment of life or member, and the offence be not in fact greater than the mittimus supposes it to be, it is clear, from the express words of the statute, that his breaking the prison will not amount to felony. (*l*) And though the offence for which the party is committed be supposed in the *mittimus* to be of such a nature as requires a capital judgment; yet if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems difficult to maintain that the breaking of the prison on a commitment for it can be felony; as the words of the statute are, "ex-

(*g*) 2 Hawk. P. C. c. 18. s. 7, 15. c. 16. s. 13. *et sequ.* 2 Inst. 590, 591. Sum. 109. 1 Hale 610, 611.

(*h*) *Ante*, 541.

(*i*) 2 Hawk. P. C. c. 18. s. 14.

(*k*) 2 Hawk. P. C. c. 18. s. 13.

(*l*) See the statute, *ante*, 546.

(*m*) *Ante*, *ibid.*

"cept the cause for which he was taken and imprisoned "require such a judgment." (*m*) And, on the other hand, if the offence which was the cause of the commitment be in truth of such a nature as requires a capital judgment, but be supposed in the *mittimus* to be of an inferior degree, it may probably be argued that the breaking of the prison by the party is felony within the meaning of the statute; for the fact for which he was arrested and committed does, in truth, require judgment of life, though the nature of it be mistaken in the *mittimus*. (*n*) It is not material whether the party who breaks his prison were under an accusation only, or actually attainted of the crime charged against him; for persons attainted, breaking prison, are as much within the exception of the statute as any others. (*o*)

A person committed for high treason becomes guilty of felony only, and not of high treason, by breaking the prison and escaping singly, without letting out any other prisoner: but if other persons, committed also for high treason, escape together with him, and his intention in breaking the prison were to favour their escape as well as his own, he seems to be guilty of high treason in respect of their escape, because there are no accessaries in high treason; and such assistance given to persons committed for felony will make him who gives it an accessary to the felony, and by the same reason a principal in the case of high treason. (*p*)

Of the nature of the breaking.

The breach of the prison within the meaning of the statute must be an *actual breaking*, and not such force and

(*m*) *Ante*, 146.

(*n*) 2 Hawk. P. C. c. 18. s. 15. It should be observed, however, that Hawkins, after giving his reasons for these conclusions, says, that no express resolution of the points appearing, and the authors who have expounded the statute, (see 2 Inst. 590, 591. Sum. 109, 110. 1 Hale 609.) seeming rather to incline to a different opinion, he shall leave these matters to the judgment of the reader.

(*o*) Staundf. P. C. 32. 2 Hawk. P. C. c. 18. s. 16.

(*p*) 2 Hawk. P. C. c. 18. s. 17. Benstead's case, Cro. Car. 583. Limerick's case, Kel. 77.

violence only as may be implied by construction of law: therefore, if the party go out of a prison without any obstruction, the prison doors being open through the consent or negligence of the gaoler, or if he otherwise escape, without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony. (*q*) And such breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for if the prison be broken by others, without his procurement or consent, and he escape through the breach so made, it seems to be the better opinion that he cannot be indicted for the breaking, but only for the escape. (*r*) And the breaking must not be from the necessity of an inevitable accident happening, without the contrivance or fault of the prisoner; as if the prison should be set on fire by accident, and he should break it open to save his life. (*s*) It seems also that no breach of prison will amount to felony unless the prisoner escape. (*t*)

Escape of the party.

Of the proceedings.

A party may be arraigned for prison-breaking before he is convicted of the crime for which he was imprisoned, (the proceeding differing in this respect from cases of escape or rescue,) on the ground that it is not material whether he be guilty of such crime or not, and that he is punishable as a principal offender in respect of the breach of prison itself. (*u*) But if the party has been indicted and acquitted of the felony for which he was committed, he is not to be indicted afterwards for the breach of prison; for though, while the principal felony was untried, it was indifferent

(*q*) 1 Hale 611. 2 Inst. 590.

(*r*) 2 Hawk. P. C. c. 18. s. 10. Pult. de Pac. 1476. Pl. 2. where it is said, that if a stranger breaks the prison, in order to help a prisoner committed for felony to escape, who does escape accordingly, this is felony; not only in the stranger that broke the prison, but also in the prisoner that escapes by means of this breach, as he consents to the breach of the prison by taking advantage of it.

(*s*) 1 Hale 611. 2 Inst. 590. Summ. 108.

(*t*) 2 Hawk. P. C. c. 18. s. 12.

(*u*) 2 Inst. 592. 1 Hale 611. 2 Hawk. P. C. c. 18. s. 18.

whether he were guilty of it or not, or rather the breach of prison was a presumption of the guilt of the principal offence, yet, upon its being clear that he was not guilty of the felony, he is in law as a person never committed for felony; and so his breach of prison is no felony. (*w*)

Of the indictment.

The indictment for a breach of prison, in order to bring the offender within the intention of the statute, must specially set forth his case in such manner that it may appear that he was lawfully in prison, and for such a crime as requires judgment of life or member: and it is not sufficient to say in general "that he feloniously broke prison;" (*x*) as there must be an actual breaking to constitute the offence. (*y*) So it is held in all the books to be necessary that such breaking be stated in the indictment. (*z*)

Of the punishment.

The offence of prison-breaking and escape, by a party lawfully committed for any treason or felony, is, as we have seen, of the degree of felony, (*a*) and will of course be punishable as such: but it should be observed, that it is a felony within clergy, though the principal felony for which the party was committed were ousted of clergy, as in case of robbery or murder. (*b*) And in this it differs from the offence of a voluntary escape, which is punishable in the same degree as the offence for which the party suffered to escape was in custody. (*c*) Where the prison-breaking is by a party lawfully confined upon any inferior charge, it is punishable as a high misprision, by fine and imprisonment. (*d*)

(*w*) 1 Hale 612. where the learned writer also says, that if the party should be first indicted for the breach of prison, and then be acquitted of the principal felony, he may plead that acquittal of the principal felony in bar to the indictment for the breach of prison.

(*x*) 2 Hawk. P. C. c. 18. s. 20.

(*y*) *Ante*, 449, 450.

(*z*) Rex *v.* Burridge, 3 P. Wms. 483. Staundf. 31. a. 2 Inst. 589, *et sequ.*

(*a*) *Ante*, 546.

(*b*) 1 Hale 612.

(*c*) *Ante*, 541.

(*d*) 2 Hawk. P. C. c. 18. s. 21.

Prison-breaking, by statutes relating to particular offences.

Before this chapter is concluded it should be observed, that, by statutes which relate only to particular crimes, the offence of prison-breaking is, in certain cases, made the subject of special enactment, and, in some instances, of capital punishment; and will be mentioned in the course of the work, in the order in which the crimes are treated of to which those statutes relate.

CHAPTER THE THIRTY-FIFTH.

Of Rescue; and of actively Aiding in an Escape, or in an Attempt to Escape.

Of Rescue.

RESCUE, or the offence of forcibly and knowingly freeing another from an arrest or imprisonment, is, in most instances, of the same nature as the offence of *prison-breaking*, which has been treated of in the preceding chapter.

Of the sort of prison, and of the imprisonment and breaking.

Thus it is laid down, that whatever is such a prison that the party himself would, by the common law, be guilty of felony in breaking from it, in every such case a stranger would be guilty of as high a crime at least in rescuing him from it. But though, upon the principle that wherever the arrest of a felon is lawful the rescue of him is a felony, it will not be material whether the party arrested for felony, or suspicion of felony, be in the custody of a private person, or of an officer; yet, if he be in the custody of a private person, it seems that the rescuer should be shewn to have knowledge of the party being under arrest for felony. (*a*) In cases where the imprisonment is so far groundless or irregular, or for such a cause, or the breaking of it, is occasioned by such a necessity, &c. that the party himself breaking the prison, is, either by the common law, or by the statute 1 Edw. II. st. 2. *de frangentibus prisonam*, saved from the penalty of a capital offender; a stranger who rescues him from such an imprisonment is, in like manner, also excused. (*b*)

(*a*) 1 Hale 606. 2 Inst. 589. Staundf. P. C. 30, 31.

(*b*) 2 Hawk. P. C. c. 21. s. 1, 2. *Ante*, 546. *et sequ.*

A rescuer may be guilty of high treason.

It has been stated in the preceding chapter, that, where a person committed for high treason breaks the prison and escapes, letting out other persons, committed also for high treason, he seems to be guilty of high treason, in case his intention in breaking the prison were to favour the escape of such other persons as well as his own : (*c*) and it is clear that a stranger who rescues a person committed for, and guilty of, high treason, knowing him to be so committed, is, in all cases, guilty of high treason. (*d*) It has been holden also, that he will be thus guilty whether he knew that the party rescued were committed for high treason or not : and that he would, in like manner, be guilty of felony by rescuing a felon, though he knew not that the party was imprisoned for felony. (*e*)

A breaking of the prison is not felony unless the prisoners escape.

As the party himself seems not to be guilty of felony by breaking the prison, unless he *actually* go out of it; (*f*) so the breaking of a prison by a stranger, in order to free the prisoners who are in it, is said not to be felony, unless some prisoner actually by that means get out of prison. (*g*)

Of the pro-

The sheriff's return of a rescue is not of itself sufficient

(*c*) *Ante*, 549.

(*d*) 2 Hawk. P. C. c. 21. s. 7. Staundf. P. C. 11. 32. Sum. 109. 1 Hale 237.

(*e*) Benstead's case, Cro. Car. 583. where it is said that it was resolved by ten of the judges, (on a special commission,) *seriatim*, that the breaking of a prison where traitors are in durance, and causing them to escape, was treason, although the parties did not know that there were any traitors there : and that, in like manner, to break a prison whereby felons escape, is felony, without knowledge of their being imprisoned for such offence. And see 1 Hale 606. But Hawkins, (P. C. c. 21. s. 7.) says, that this opinion is not proved by the authority of the case, (1 Hen. VI. 5.) on which it seems to be grounded. It should be mentioned, however, that Benstead's case is spoken of in Rex *v.* Burridge, 3 P. Wms. 468. as having been cited and allowed to be law at an assembly of all the judges of England, except the Chief Justice of the Common Pleas, (that place being at the time vacant,) in Limerick's case, Keyl. 77.

(*f*) *Ante*, 550.

(*g*) 2 Hawk. P. C. c. 18. s. 12; c. 21. s. 3.

to put the party to answer for it as a felony, without indictment or presentment. (*h*) And it is the better opinion that he who rescues one imprisoned for felony cannot be arraigned for such offence as a felony, until the principal offender be first attainted; unless the person rescued were imprisoned for high treason, in which case the rescuer may be immediately arraigned; all being principals in high treason. But it is said that he may be immediately proceeded against for a misprision only if the king please: (*i*) and if the principal be discharged, or found guilty only of an offence not capital, such as petit larceny, &c. though the rescuer cannot be charged with felony, yet he may be fined and imprisoned for a misdemeanor. (*k*) ceedings in cases of rescue.

The indictment for a rescue, like that for an escape, (*l*) or for breaking prison, (*m*) must specially set forth the nature and cause of the imprisonment, and the special circumstances of the fact in question. (*n*) And the word *rescussit*, or something equivalent to it, must be used to shew that it was forcible and against the will of the officer who had the prisoner in his custody. (*o*) Of the indictment for a rescue.

The rescue of one apprehended for treason is itself treason: and the party rescuing one in custody for felony, or suspicion of felony, will, as we have seen, be guilty of a crime of the same kind; though not in all cases punishable in the same degree; for the rescuer will be entitled to his clergy, though the crime of the prisoner rescued were not within clergy. (*p*) Where the party rescued was in custody for a misdemeanor only, the rescuer will be punishable as for a misdemeanor; for, as those who break prison are punishable for a high misprision, by fine and imprisonment, in those Of the punishment for a rescue.

(*h*) 1 Hale 606.
(*i*) 2 Hawk. P. C. c. 21. s. 8.
(*k*) 1 Hale 598, 599.
(*l*) *Ante*, 539.
(*m*) *Ante*, 551.
(*n*) 2 Hawk. P. C. c. 21. s. 5.
(*o*) Rex *v.* Burridge, 3 P. Wms. 483.
(*p*) 1 Hale 607.

cases wherein they are saved from judgment of death by the statute 1 Edw. II. stat. 2. *de frangentibus prisonam;* so also are those who rescue such prisoners, in the like cases, punishable in the same manner. (*q*)

The rescue of a prisoner, in any of the superior courts, committed by the justices, is a great misprision; for which the party, and the prisoner, (if assenting,) will be liable to be punished by imprisonment for life, forfeiture of lands for life, and forfeiture of goods and chattels; though no stroke or blow were given. (*r*)

Of aiding a prisoner to escape.

The aiding and assisting a prisoner to escape out of prison, by whatever means it may be effected, is an offence of a mischievous nature, and an obstruction to the course of justice: and the assisting *a felon* in making an actual escape, is an offence of the degree of felony. (*s*) In a case which underwent elaborate discussion, the court of King's Bench held that where a person assisted a prisoner who had been convicted of felony within clergy, and, having been sentenced to be transported for seven years, was in custody under such sentence, to escape out of prison, the person so assisting was an accessary to the felony after the fact. (*t*) The court proceeded upon the ground that one so convicted of felony, within the benefit of clergy, and sentenced to be transported for seven years, continues a felon till actual transportation and service pursuant to the sentence; and that the assistance given in this case amounted, in law, to a receiving, harbouring, or comforting such felon. (*u*) But

(*q*) 2 Hawk. P. C. c. 21. s. 6. 4 Blac. Com. 130.

(*r*) 1 East. P. C. c. 8. s. 3. p. 408. 410. 6 Bac. Abr. *Rescue*, (C.) 3 Inst. 141. 22 Edw. III. 13.

(*s*) Tilley's case, 2 Leach 671.

(*t*) Rex *v.* Burridge, 3 P. Wms. 439.

(*u*) The assistance, as stated in the special verdict in this case, was not particularly specified: the statement was, that the defendant, (who was confined in the same gaol with the party whom he assisted to escape,) "did wilfully aid and assist "the said W. P., so being in cus- "tody as aforesaid, to make his "escape out of the said gaol."

they held the indictment to be defective, in not charging that the defendant knew that the principal was guilty, or convicted of felony. (*w*) The offence of aiding a prisoner to escape out of prison appears also to have been considered as an accessorial offence in a case of piracy. On a return to a habeas corpus, in the case of one *Scadding*, who had been committed to the Marshalsea by the court of Admiralty, the cause appeared to be for aiding and abetting one *Exon*, who was indicted for piracy, to escape out of prison; whereupon all the court held that, though the fact were committed by *Scadding*, within the body of the county, yet, because it depended upon the piracy committed by *Exon*, of which the temporal judges had no cognizance, and was as it were an accessorial offence to the first piracy, which was determinable by the admiral, they must remand the prisoner. (*x*)

Statutes respecting the rescuing of prisoners, or aiding them to escape.

Several statutes, some of which have been already mentioned, and others will be referred to in the course of the work, especially provide for the punishment of those who rescue or aid in the escape of persons apprehended or committed for the particular offences enumerated in those acts. There are also some special provisions, by statutes, upon this subject, which may be noticed shortly in this place.

9 Geo. I. c. 22. Rescuing persons in custody for offences against this act, or aiding such offenders, felony without clergy.

By the 9 Geo. I. c. 22. (commonly called the *Black Act*,) persons forcibly rescuing any person being lawfully in custody of any officer, or other person, for any of the offences mentioned in the statute, or by gift or promise of money, or other reward, procuring any of his majesty's subjects to join in any such unlawful act, are, upon conviction, to be adjudged guilty of felony, and to suffer death without be-

But any assistance given to one known to be a felon, in order to hinder his suffering the punishment to which he is condemned, is a sufficient receipt to make a man an accessory after the fact. *Ante*, 48.

(*w*) 3 P. Wms. 492. And see the indictment on which the prisoner was tried a second time, convicted, and transported, *id.* 499, 503.

(*x*) Scadding's case, Yelv. 134. 1 East. P. C. c. 17. s. 14. p. 810.

nefit of clergy. (*y*) And if any person, being charged with any of the offences against this statute, and being required by order of the privy council to surrender himself, neglects so to do for forty days, the person so neglecting, and all that knowingly conceal, aid, abet, or succour him, are declared to be felons, without benefit of clergy. (*z*)

25 Geo. II. c. 37. s. 9. Rescuing persons in custody for murder.

By the 25 Geo. II. c. 37. s. 9. "If any person or persons whatsoever shall, by force, set at liberty, or rescue, or attempt to rescue or set at liberty, any person, out of prison, who shall be committed for or found guilty of murder, or rescue, or attempt to rescue, any person convicted of murder going to execution or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony, and shall suffer death without benefit of clergy." And the tenth section of the statute enacts, that if any person, after execution, shall, by force, rescue, or attempt to rescue, the body of such offender, out of the custody of the sheriff, or his officers, during its conveyance to any of the places directed by the act, or from the company of *surgeons*, or their servants, or from the house of any surgeon where the same shall have been deposited in pursuance of the act, such offender shall be guilty of felony, and be liable to be transported for the term of seven years.

S. 10. Rescuing the body of a murderer after execution.

55 Geo. III. c. 108. s. 13. As to escape of offenders sentenced by a court-martial, and conditionally pardoned: and 37 Geo. III. c. 140. s. 6. as to those sentenced by a naval court-martial.

The 55 Geo. III. c. 108. s. 13. *(Mutiny Act,)* enacts, that if any offender under sentence of death by a court martial, shall obtain a conditional pardon, (as mentioned in the act,) all the laws in force touching the escape of felons under sentence of death, shall apply to such offender, and to all persons aiding, abetting, or assisting, in any escape, or intended escape, of any such offender, or contriving any such escape, from the time when an order shall be made by a justice or baron, and during all the proceedings had for the purposes mentioned in the act. A former statute, 37 Geo.

(*y*) S. 1. (*z*) S. 4, 5.

III. c. 140. s. 6. contains a similar provision with respect to offenders under sentence of death by a *naval* court-martial, and allowed the benefit of a conditional pardon.

52 Geo. III. c. 156. Persons aiding the escape of prisoners of war made liable to transportation.

The 52 Geo. III. c. 156. provides against the aiding of the escape of prisoners of war, and enacts, that "Every "person who shall knowingly and wilfully aid or assist any "alien enemy of his majesty, being a prisoner of war in his "majesty's dominions, whether such prisoner shall be con- "fined as a prisoner of war in any prison, or other place of "confinement, or shall be suffered to be at large in his ma- "jesty's dominions, or any part thereof, on his parole, to "escape from such prison, or other place of confinement, "or from his majesty's dominions, if at large upon parole," shall, upon conviction, be adjudged guilty of felony, and be liable to be transported for life, or for fourteen or seven years. The act also declares, that every person who shall knowingly and wilfully aid or assist any such prisoner at large on parole in quitting any part of his majesty's dominions where he may be on his parole, although he shall not aid or assist such person in quitting the coast of any part of his majesty's dominions, shall be deemed guilty of aiding the escape of such person within the act. (*a*) There is a further provision as to assisting such prisoners in their escape after they have got upon the high seas. The third section of the statute enacts, "That if any person or per- "sons owing allegiance to his majesty, after any such pri- "soner as aforesaid hath quitted the coast of any part of "his majesty's dominions in such his escape as aforesaid, "shall, knowingly and wilfully, upon the high seas, aid or "assist such prisoner in his escape to or towards any other "dominions or place, such person shall also be adjudged "guilty of felony, and be liable to be transported as afore- "said." It is also provided that offences committed upon the high seas, and not within the body of any county, may be tried in any county within the realm. (*b*)

(*a*) S. 2.

(*b*) S. 3. By s. 4. the act is not to prevent offenders from being prosecuted, as they might have

56 Geo. III. c. 22. Persons rescuing or aiding the escape of Buonaparte, guilty of felony, without clergy.

The statute 56 Geo. III. c. 22., which was passed for the more effectually detaining in custody *Napoleon Buonaparte*, enacts, that if any persons shall rescue, or attempt to rescue him, or shall aid or assist in his escape, or in any attempt to escape from custody, such person shall be guilty of felony, without benefit of clergy. (*c*) And persons assisting, or furthering his escape, after he may have been rescued or have escaped or departed, are to be deemed guilty of aiding his escape within the act. (*d*) Persons also who shall, upon the high seas, aid or further him in escaping, are to be adjudged guilty of felony, without benefit of clergy. (*e*)

16 Geo. II. c. 31. Aiding a prisoner convicted of treason or felony, or committed for those offences in an attempt to escape.

The mere aiding an attempt of persons confined to make an escape, though no escape should ensue, is made highly penal by the 16 Geo. II. c. 31. which enacts, that "if any "person shall, by any means whatsoever, be aiding or assisting to any prisoner to attempt to make his or her escape "from any gaol, although no escape be actually made, in "case such prisoner then was attainted or convicted of "treason, or any felony, except petty larceny, or lawfully "committed to or detained in any gaol, for treason, or any "felony, except petty larceny, expressed in the warrant of "commitment or detainer;" every person so offending shall, on conviction, be adjudged guilty of felony, and be transported for seven years. (*f*) And, "in case such prisoner "then was convicted of committed to or detained in any "gaol, for petty larceny, or any other crime, not being "treason or felony, expressed in the warrant of his or her "commitment or detainer as aforesaid, or then was in gaol "upon any process whatsoever, for any debt, damages,

Aiding &c. a prisoner convicted or committed for petty larceny, &c. or confined upon process for any debt, &c. amounting to 100*l.*

been if the act had not been passed; but no person prosecuted otherwise than under the provisions of the act is to be liable to be prosecuted for the same offence under the act; and no person prosecuted under the act is, for the same offence, to be otherwise prosecuted.

(*c*) S. 3.

(*d*) S. 4.

(*e*) S. 5. The sixth section provides for the trial of offences against the act in any county in England; and the seventh section relates to the detention of offenders.

(*f*) 16 Geo. II. c. 31. s. 1.

" costs, sum or sums of money, amounting in the whole " to the sum of one hundred pounds ;" every person so offending, and being convicted, shall be deemed guilty of " a misdemeanor, and be liable to a fine and imprison- " ment." (*g*)

16 Geo. II. c. 31. s. 2.—Conveying any disguise or instruments into any prison, to facilitate the escape of prisoners, convicted of or committed for treason or felony.

The statute further enacts, " That if any person shall con- " vey, or cause to be conveyed, into any gaol or prison, any " vizor, or other disguise, or any instrument or arms, pro- " per to facilitate the escape of prisoners, and the same " shall deliver, or cause to be delivered to any prisoner, in " any such gaol, or to any other person there, for the use " of any such prisoner, without the consent or privity of " the keeper, or under keeper, of any such gaol or prison ; " every such person, although no escape, or attempt to es- " cape, be actually made, shall be deemed to have delivered " such vizor, or other disguise, instrument, or arms, with " an intent to aid and assist such prisoner to escape, or at- " tempt to escape ; and in case such prisoner then was at- " tainted, or convicted of treason, or any felony, except " petty larceny, or lawfully committed to or detained in " any such gaol for treason, or any felony, except petty " larceny, expressed in the warrant of commitment or de- " tainer ;" every person so offending, and being convicted, shall, in like manner, be deemed guilty of felony, and be transported for seven years. (*h*) And it proceeds to enact, that, " In case the prisoner to whom, or for whose use, such " vizor or disguise, instrument or arms, shall be so deli- " vered, then was convicted, committed, or detained for " petty larceny, or any other crime, not being treason or " felony, expressed in the warrant of commitment or de- " tainer, or upon any process whatsoever, for any debt, da- " mages, costs, sum, or sums of money, amounting in the " whole to the sum of one hundred pounds ;" every person so offending, and being convicted, shall be deemed guilty

Or to facilitate the escape of prisoners convicted or committed for petty larceny, &c. ; or confined upon any process for any debt, &c. amounting to 100*l.*

(*g*) 16 Geo. II. c. 31. s. 1. (*h*) *Id.* s. 2.

of a misdemeanor, and be liable to a fine and imprisonment. (*i*)

16 Geo. II. c. 31. s. 3.—Assisting any person charged with treason or felony, in an attempt to escape from a constable, &c.

Or from any boat, &c. carrying felons for transportation, or from the contractor for their transportation.

It is further enacted by this statute, "That if any person "shall aid or assist any prisoner to attempt to make his or "her escape from the custody of any constable, headborough, tithingman, or other officer or person who shall "then have the lawful charge of such prisoner, in order to "carry him or her to gaol, by virtue of a warrant of commitment for treason, or any felony, (except petty larceny,) "expressed in such warrant; or if any person shall be aiding or assisting to any felon to attempt to make his escape "from on board any boat, ship, or vessel, carrying felons "for transportation, or from the contractor for the transportation of such felons, his assigns or agents, or any "other person to whom such felon shall have been lawfully "delivered, in order for transportation;" every person so offending, and being convicted, shall be deemed guilty of felony, and be transported for seven years. (*k*)

Limitation of prosecutions.

It is provided by this statute, that there shall be no prosecution for any of these offences unless it be commenced within a year after the offence committed. (*l*)

Persons ordered for transportation by this act, and returning, or being at large before the expiration of their sentence.

And it is also enacted, that if any person ordered for transportation in pursuance of this act shall return from transportation, or be at large in any part of Great Britain, without some lawful cause, before the expiration of the term for which such person shall have been ordered to be transported, such person shall be liable to the same punishment, and methods of prosecution, trial, and conviction, for so returning or being at large, as other felons transported, or ordered to be transported, were liable by the laws then in force.

(*i*) 16 Geo. II. c. 31. s. 2. (*l*) S. 4.
(*k*) *Id. Ibid.* s. 3.

Cases upon the 16 Geo. II. c. 31. A commitment on *suspicion* only not within the act.

It should be observed, that the second section of this statute, relating to the conveying of instruments, &c. into any prison, in order to facilitate the escape of the prisoners, makes the offender guilty, in cases where the prisoner is committed to or detained in any gaol for treason or felony *expressed* in the warrant of commitment (*m*). This has been holden to mean, that the offence should be "*clearly and plainly expressed;*" so that a case, where the commitment is *on suspicion* only, is not within the act: for there are two kinds of commitments, which essentially differ from each other; as a prisoner may be admitted to bail on a commitment for suspicion only, but not on a commitment for treason or felony clearly and plainly expressed in the warrant (*n*). And this doctrine was recognized and acted upon in a subsequent case of an indictment upon the third section of the statute, which relates to the aiding a prisoner to escape from the custody of a constable having charge of him by virtue of a warrant of commitment for felony "*expressed*" in such warrant. The indictment stated, that the commitment was on *suspicion* of burglary, and the warrant produced in evidence at the trial corresponded with this statement: the point being reserved for the opinion of the judges, they were unanimously of opinion that a commitment *on suspicion* was not within the statute (*o*).

The statute does not extend to cases where an actual escape is made.

A majority of the judges decided a point of great importance in the construction of this statute; namely, that it does not extend to cases where an *actual escape* is made, but must be confined to cases of an attempt, without effecting the escape itself. They said, "the statute purports to be "made for the further punishing of those persons who shall "aid and assist persons attempting to escape, and makes "the offence felony: it creates a new felony; but the offence "of assisting a felon in making an actual escape was felony

(*m*) *Ante*, 561.
(*n*) Walker's case, 1 Leach 97.
(*o*) Greeniff's case, 1 Leach 363.
and Gibbons's case, 1 Leach 98. note (a), S. P.

"before; and therefore, does not seem to fall within the view "or intention of the legislature, when they made this sta- "tute (*p*)." In this case it was also holden, that an indictment, charging the defendant with aiding and assisting a prisoner to attempt to make an escape, need not state that the party aided did attempt to make the escape; for he could not have aided, if no such attempt had been made (*q*).

An indictment on the statute need not state that the party aided did attempt to make the escape.

(*p*) Tilley and Others, (case of) 2 Leach 662.

(*q*) *Id. Ibid.*

CHAPTER THE THIRTY-SIXTH.

Of Returning, or Being at Large, after Sentence of Transportation; and of Rescuing or Aiding the Escape of a Person under such Sentence.

Offences by statutes. But assisting a felon sentenced to be transported to escape, makes the party an accessory after the fact at common law.

AS *exile* or *transportation* is a species of punishment unknown to the common law of England, and inflicted only under the sanction of enactments of the legislature, offences committed by not submitting to that punishment are principally dependant upon the provisions of particular statutes. But as a party convicted of felony within benefit of clergy, and sentenced to be transported for seven years, continues a felon, till actual transportation and service, pursuant to the sentence; and as it is felony at common law to assist a felon to escape out of lawful custody; it has been holden that, independently of any statutable enactments, a person assisting such felon convict, being in custody under sentence of transportation, to escape out of prison, is an accessory to the felony after the fact; provided it be such an assistance as in law amounts to a receiving, harbouring, or comforting, such felon (*a*).

4 Geo. I. c. 11. Persons convicted of offences within the benefit of clergy may be transported for 7 years. And persons convicted of offences for which they are excluded the benefit of

The statute 4 Geo. I. c. 11. enacts that, where persons shall be convicted of grand or petit larceny, or any felonious stealing, and shall be by law entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping (except persons convicted for receiving or buying stolen goods, knowing them to be stolen,) the court may order them to be transported to *America* for seven years, and may convey and transfer them to the use of any person who shall contract for such transportation; and

(*a*) Rex *v.* Burridge, M. T. 1735. 3 P. Wms. 439. *ante*, 556.

clergy, and receivers of stolen goods, may be transported for 14 years, or other term.

enacts also, that where any persons shall be convicted of any crimes for which by law they are excluded the benefit of clergy, and his majesty shall extend the royal mercy to such offenders upon the condition of transportation to *America*, signified under the great seal by one of his majesty's principal secretaries of state, the court may allow such offenders the benefit of a pardon under the great seal, and may order the like transfer and conveyance, to persons making contracts for their transportation, of any such offenders, as also of any person convicted of receiving or buying stolen goods, knowing them to be stolen, for the term of fourteen years, in case such condition of transportation be general; or else for such other term as shall be made part of such condition, if any particular time be specified by his majesty (*b*). And the statute then enacts

Persons so ordered to be transported, and returning before the end of their term, are to be punished as persons attainted of felony without clergy.

" that if any offender or offenders, so ordered by any such " court to be transported for any term of seven years, or " fourteen years, or other time or times as aforesaid, shall " return into any part of Great Britain or Ireland before " the end of his or their said term, he or she so returning " as aforesaid, shall be liable to be punished as any person " attainted of felony, without the benefit of clergy; and ex- " ecution may and shall be awarded against such offender or " offenders accordingly." But it is provided, that the king may at any time pardon and dispense with such transportation, and allow the return of any such offender upon certain terms (*c*).

6 Geo. I. c. 23. s. 5. Persons rescuing, &c. offenders from the custody of those who have contracted for their transportation, guilty of felony without clergy.

The next act passed, for the more effectual transportation of felons, was the 6 Geo. I. c. 23. which, after making different provisions respecting contracts for such transportation, enacts, that persons so contracting may carry and secure the felons and offenders through any counties of *Great Britain* towards the sea-port from whence they are to be transported, in such manner as they shall think fit; " and that if any " person or persons shall rescue such felons or offenders, or

(*b*) 4 Geo. I. c. 11. s. (*c*) *Id.* s. 2.

"any of them, he, she, and they, so rescuing, or aiding or "assisting such felons or offenders, or any of them, in "making their escape from such person or persons as shall "have them in their custody as aforesaid," shall be deemed guilty of felony, and suffer death without benefit of clergy. (*d*)

And by s. 6. felons ordered for transportation, and being at large before the end of their term, are to suffer death without clergy.

The statute then recites, that felons ordered for transportation had come, and that others might come, on shore, and return to Great Britain before they had been actually transported to *America*, or might break gaol or escape before such transportation; and enacts, "that if any felon or "felons, who have been or shall be ordered for transporta- "tion by this or any other act, shall be afterwards at large "within any part of this kingdom of *Great Britain*, without "some lawful cause, before the expiration of the term for "which such felon or felons was, were, or shall be ordered to "be transported," such persons being convicted shall suffer death, as in cases of felony, without benefit of clergy. (*e*)

Trial of such offenders.

It is further provided by this statute, that such offenders may be tried either before the justices of assize, gaol delivery, &c. for the county, &c. where they shall be apprehended, or before justices of assize, gaol delivery, &c. for that county, &c. from whence they were ordered to be transported: and that the clerk of the assize and clerk of the peace where such orders of transportation shall be made, and their successors for the time being, shall certify a transcript briefly and in few words, containing the effect and tenor of every indictment and conviction of such person, and of the order and contract for his or her transportation, to the justices of assize, &c. where such person shall be indicted; and that such certificate shall be a sufficient proof that such person has before been convicted and ordered to be transported. (*f*)

Evidence of former conviction and order for transportation.

16 Geo. II. c. 15. Felons, &c. ordered

The 16 Geo. II. c. 15. after reciting that many felons who had agreed, upon certain conditions, to transport them-

(*d*) 6 Geo. I. c. 23. s. 5.
(*e*) *Id.* s. 6.
(*f*) *Id.* s. 7.

to be transported, or agreeing to transport themselves, and being afterwards at large before the expiration of the term, to suffer death without benefit of clergy.

selves, either for life, or for some term or number of years, had already, and might thereafter come on shore or return, enacts, "that if any felon or other offender already ordered, "or hereafter to be ordered for transportation, or who "hath already, or hereafter shall agree to transport him or "herself, on certain conditions, to *America*, either for life "or any number of years, shall be afterwards at large "within any part of *Great Britain*, without some lawful "cause, before the expiration of the term for which he or "she were so ordered to be transported, or had so agreed "to transport him or herself;" such persons being convicted, shall suffer death without benefit of clergy. (*g*)

Trial and evidence.

And it provides, that such offenders shall be tried before such judges, and in such manner, and that the same evidence shall be made use of for their conviction as is directed by the 6 Geo. I. c. 23. in cases of felons returning from transportation. (*h*)

16 Geo. II. c. 31. s. 3. Aiding any felons in an attempt to escape from transportation.

By the 16 Geo. II. c. 31. s. 3. "if any person shall be "aiding or assisting to any felon to *attempt* to make his "escape from on board any boat, ship, or vessel, carrying "felons for transportation, or from the contractor for the "transportation of such felons, his assigns or agents, or any "other person to whom such felon shall have been lawfully "delivered in order for transportation;" every person so offending shall be guilty of felony, and transported to *America* for seven years. (*i*)

8 Geo. III. c. 15. s. 1. Offenders reprieved and ordered for transportation, and

The 8 Geo. III. c. 15. s. 1. recites, that offenders excluded from the benefit of clergy were frequently reprieved by the judge who tried them, and, upon his recommendation, might receive mercy, on condition of transportation to *America* for life, or for the term of fourteen years; and en-

(*g*) 16 Geo. II. c. 15. s. 1.

(*h*) *Id.* s. 2. *ante*, 567.

(*i*) By s. 4. the prosecution must be commenced within a year after the offence committed. See this statute, and some cases upon its construction, *ante*, 562. *et sequ.*

acts that where, upon such recommendation, such offenders shall so receive mercy, signified by a principal secretary of state to the judge so recommending, it shall be lawful for every such judge to make an order for the immediate transportation of every such offender: and that, "if such of- "fender so ordered for transportation shall be afterwards "at large, within any part of this kingdom of *Great Britain*, "without some lawful cause, before the expiration of the "term for which such offender shall have been ordered to "be transported," he shall suffer death, as in cases of felony, without benefit of clergy. And it is provided, that he shall be tried before such judges, and in such manner, and by the same evidence, as directed by the laws then in being for the trial of other felons found at large before the expiration of the term of transportation. (*k*)

being afterwards at large before the expiration of the term, to suffer death without benefit of clergy.

Trial and evidence.

These statutes, relating generally to the transportation of convicts, applied only to their transportation to the continent of *America*; and it appears to have been determined that where any particular statute, imposing the punishment of transportation, enacted that a convict should be transported for seven years, without saying to what place, it should be understood to mean to *America*. (*l*) But *America* having at length separated from its connection with *Great Britain*, the punishment of felons and other offenders by transportation to that country was attended with many difficulties; and some different regulations were found necessary.

Regulations for the transporting of convicts to other countries than *America*.

It was therefore enacted, by the 19 Geo. III. c. 74. that when any person at any session, &c. in *England*, or great session for *Chester* or *Wales*, shall be convicted of any grand or petty larceny, or any other crime for which he is or shall be liable to be transported to *America*, the court before which any such person shall be so convicted, or any court

19 Geo. III. c. 74. Convicts liable to be transported to *America* may be transported to any parts *beyond the seas*.

(*k*) 8 Geo. III. c. 15. s. 1. note (a). 1 Hawk. P. C. c. 47. s. 19.

(*l*) Aickles's case, 1 Leach 394.

holden for the same place, with like authority, if such court shall think fit, may order and adjudge that such person shall be transported to any parts *beyond the seas*, whether the same be situated in *America* or elsewhere; in such and the like manner, and for any term of years not exceeding the term as and for which such person is or shall be liable to be transported to *America*.(*m*) The statute then enacts, that when any such person who shall be so convicted, shall, in consequence thereof, be ordered to be transported to any parts beyond the seas; or if his majesty shall extend the royal mercy to any offender convicted or attainted of any felony, by which he is excluded from clergy, upon the condition of transportation to any parts beyond the seas as aforesaid, "then and in any such cases all laws, statutes, usages, "and customs now in force, with regard to the transporta- "tion of criminals to *America*, and their punishment for "being afterwards at large, within any part of the king- "dom of *Great Britain*, before the expiration of the several "terms for which they were ordered to be transported, or "had agreed to transport themselves, and particularly the "several provisions contained in the 4 Geo. I. c. 11., "6 Geo. I. c. 23., 16 Geo. II. c. 15., and the 8 Geo. III. "c. 15., shall take place, be in force, and enure, with re- "gard to the transportation of all such offenders, to any "parts beyond the seas, and with regard to their punish- "ment for being afterwards at large in this kingdom be- "fore the expiration of their respective terms, in like "manner as if the same had been repeated and specially "inserted in this act." (*n*)

And when such convicts shall be ordered to be transported beyond the seas, or if the king shall extend mercy to offenders who are excluded from clergy, upon condition of transportation beyond the seas, then all laws, statutes, &c. with regard to transportation to *America*, and being at large afterwards before the expiration of the sentence shall be in force with regard to transportation *beyond the seas*, or being at large afterwards before the expiration of the sentence.

(*m*) 19 Geo. III. c. 74. s. 1.

(*n*) *Id* s. 2. This act was only temporary, and contained a great many provisions (principally relating to the erection of penitentiary houses) which have been suffered to expire. But the 1st and 2d sections which are cited in the text, have been continued by the 28 Geo. III. c. 24. s. 3. 34 Geo. III. c. 60. s. 1. 39 Geo. III. c. 51. s. 1. 42 Geo. III. c. 28. s. 1. 46 Geo. III. c. 28. s. 1. 53 Geo. III. c. 39. s. 1. 54 Geo. III. c. 30. s. 1. and, lastly, by the 56 Geo. III. c. 27. s. 20. to the 1st May, 1821.

It appears, however, to have been a matter of difficulty to find proper places beyond the seas for the purposes of transportation; and it was thought expedient to authorize the removal of convicts who had received sentence of transportation to temporary places of confinement. Accordingly the 24 Geo. III. sess. 2. c. 56. after providing that offenders convicted in England or Wales of any offence for which they were liable to be transported, might be ordered to be transported beyond the seas; and that his majesty, with the advice of his privy council, might appoint to what parts beyond the seas, either within his dominions or elsewhere, such offenders should be transported; (*o*) and that any offenders so ordered to be transported, or having agreed to transport themselves on certain conditions, and being afterwards at large before the expiration of their term, should suffer death without clergy; (*p*) enacted, that the king might order or authorize three justices of peace to direct the removal of male prisoners under sentence of transportation to such place of confinement in *England* or *Wales* as the king or the justices so authorized should appoint; to be there kept in the custody of certain overseers. (*q*) It enacted also, that any offender escaping from such custody, and any person rescuing, attempting to rescue, or conveying instruments, &c. to such offender, should be punishable as if the offender had been confined in a gaol or prison, under the custody of the sheriff or other gaoler. (*r*) There was also a provision that if offenders could not conveniently be transported to the place mentioned in their sentence, the court, &c. might order them to be transported to any other place; and that such offenders returning before the expiration of their terms should suffer death without clergy. (*s*) But this statute is at present under a temporary repeal, which possibly may be continued. (*t*)

24 Geo. III. sess. 2. c. 56. authorized the removal of convicts liable to transportation to temporary places of confinement in *England* or *Wales*.

And offenders escaping from custody, and any persons rescuing them, &c. were made subject to such punishment as if the offender had been confined in a gaol or prison.

(*o*) 24 Geo. III. sess. 2. c. 56. s. 1.
(*p*) *Id.* s. 5.
(*q*) *Id.* s. 6, 8.
(*r*) *Id.* s. 10.
(*s*) *Id.* s. 13.
(*t*) Its provisions, as far as they related to the removal of offenders to temporary places of confine-

25 Geo. III. c. 46. provides for the more effectual transportation of offenders in *Scotland*, and for the removal of prisoners reprieved during pleasure, or under sentence of transportation in *Scotland*, to temporary places of confinement.

The 25 Geo. III. c. 46. was passed for the more effectual transportation of offenders in *Scotland*, and also to authorize the removal of prisoners under sentence of death, but reprieved during pleasure, or under sentence of transportation in Scotland, to temporary places of confinement. It contains enactments nearly similar to those of the 24 Geo. III. sess. 2. c. 56. but as it is at present an existing statute, its provisions respecting the return or escape of offenders under sentence of transportation, and the rescuing such persons, or aiding them in their escape, may be mentioned rather more at length. The second section, after providing that the persons contracting for the transportation of such offenders, or any other person lawfully authorized, may, in such manner as they shall think fit, carry and secure them through any county of Great Britain towards the sea-port or place from whence they are to be transported, enacts, " that if any person or persons shall rescue such offenders, " or any of them, or assist them, or any of them, in making " their escape from such person or persons as shall have " them in their custody as aforesaid," such persons shall be guilty of felony, and suffer death without benefit of clergy.(*u*)

And provides for the punishment of offenders escaping, or being at large, before the expiration of

ment, were only to continue to the 1st of June 1787, and to the end of the then next session of parliament; but they were afterwards continued by different acts, and then repealed by the 55 Geo. III. c. 156. s. 1. This act of the 55 Geo. III. was however, by s. 19. to continue only till the 1st of May 1816; and the 24 Geo. III. c. 56. would therefore have been in existence again after that time: but the 55 Geo. III. c. 156. is continued so far as relates to the repeal of the 24 Geo. III. c. 56. by the 56 Geo. III. c. 27 s. 1. But this last act is by s. 21. to continue only to the 1st May 1821. By s. 2. of the 56 Geo. III. c. 27. the provisions of the 24 Geo. III. c. 56. are to be valid in relation to proceedings commenced before the 55 Geo. III. c. 156.

(*u*) By s. 10. the provisions of the act, so far as they extended to authorize the removal of offenders to temporary places of confinement, were to continue until the 1st June 1787, and from thence till the end of the then next session; but they were afterwards continued by the 34 Geo. III. c. 60. s. 2. 39 Geo. III. c. 51. s. 2. 42 Geo. III. c. 28. s. 3. 46 Geo. III. c. 28. s. 2. 53 Geo. III. c. 39. s. 2. 54 Geo. III. c. 30. s. 2. and lastly, by the 56 Geo. III. c. 27. s. 20. until the 1st May 1821.

their sentences, and of persons rescuing them, or assisting them to escape.

The statute then enacts, "that if any offender or offenders "who shall be so ordered by such court as aforesaid (viz. "any court competent for the trial of crimes in *Scotland*) "to be transported beyond the seas, or who shall agree to "transport himself or herself on certain conditions, either "for life or any number of years, to any such place or "places, part or parts as shall be appointed by his majesty, "(as mentioned in the act) shall be afterwards at large in "*Great Britain* or *Ireland*, without some lawful cause, be- "fore the expiration of the term for which such offender or "offenders shall have been ordered to be transported be- "yond the seas, or shall have so agreed to transport himself "or herself as aforesaid," such offender, being at large as aforesaid, shall suffer death as in cases of felony, without benefit of clergy. (*w*) A further provision empowers the king to order, or to authorize, two lords of justiciary to order the removal of male prisoners under sentence of death, but reprieved during pleasure, or under sentence of transportation from any gaol in *Scotland* to such place of confinement within Great Britain, or the limits of any part of Great Britain, as his majesty or others legally authorized shall from time to time appoint; (*x*) and makes the overseer who shall have the custody of any such offender answerable for his escape as if he were a sheriff or gaoler; (*y*) and further provides that "if any such offender shall break from, "or unlawfully escape from, the custody of such overseer; "or if any person shall rescue, or attempt to rescue, or "assist in rescuing, any such offender from such custody; "or shall convey, or cause to be conveyed, any disguise, "instrument, or arms, to such offender; every such offence "shall be punishable in the same manner as if such offender "had been confined in a gaol or prison in the custody of

(*w*) 25 Geo. III. c. 46. s. 3. The trial may be in *Scotland* (if the offender is found at large there) before any court which might have tried the original offence: and a reward of 20*l.* is given to persons discovering and prosecuting such offenders.

(*x*) *Id.* s. 4.

(*y*) *Id.* s. 6.

" the sheriff, &c. for the crime of which such offender shall " have been convicted." (*z*) And after providing that if offenders cannot conveniently be transported to the place mentioned in their sentence, two judges of the court of justiciary may order them to be transported to any other place appointed by his majesty for the transportation of such offenders, the statute enacts, that " in case such offender, " so ordered for transportation, shall be afterwards at large " within *Great Britain*, without some lawful cause, before " the expiration of the term for which such offender shall " have been ordered to be transported," every such offender shall suffer death as in cases of felony, without clergy. (*a*)

31 Geo. III. c. 46. s. 7. Persons liable to be transported may be kept to hard labour in the county gaol.

By the 31 Geo. III. c. 46. s. 7. it was enacted, that offenders sentenced to transportation, or to whom the royal mercy should be extended on condition of transportation, might be ordered to be imprisoned and kept to hard labour in the gaol for the county where they had been convicted, until they should be transported, or otherwise removed, or until by the expiration of their sentence, or otherwise, they should be entitled to their liberty; and that the time of such confinement should be reckoned in discharge, or in part discharge, of the term of their transportation.

Disposal and employment of offenders sentenced to transportation, and removal of them

The proper disposal and employment of offenders sentenced to transportation, whom it was not always found expedient to send beyond the seas, have occasionally occupied the attention of the legislature, and been provided for by statutable enactments of a limited duration. (*b*) And a

(*z*) 25 Geo. III. c. 46. s. 7.

(*a*) *Id.* s. 8. The trial and evidence are to be according to the laws for the trial of other offenders found at large within the kingdom before the expiration of their sentences: and a reward of 20*l.* is given for prosecuting to conviction.

(*b*) The 16 Geo. III. c. 43. provided for changing the punishment of transportation to hard labour, in cleansing the river *Thames*, or to confinement within the county to hard labour. This statute was continued by the 18 Geo. III. c. 62. and the 19 Geo. III. c. 54. to the 1st July 1779: and by the 19 Geo.

recent statute, 56 Geo. III. c. 27. which makes many alterations and amendments in the laws relating to the transportation of offenders, provides for their removal to places of confinement in *England* or *Wales*, and their employment in such places; and also makes their escape, rescue, &c. punishable in the same manner as if they were confined in a gaol or prison. This statute, however, is also only of limited duration; (*c*) but as its enactments are important, and may be continued, it is thought proper to state the substance of them in this place.

to places of confinement in *England* or *Wales*.

This statute first makes provision respecting the transportation of offenders *beyond the seas*. It enacts, that the court before which any persons shall have been or shall be convicted, in *England* or *Wales*, of grand or petit larceny, or any other offence for which such persons shall be subject to be transported, or any subsequent court for the same county, &c. may order and adjudge that such persons be transported beyond the seas for any term not exceeding the number of years or term for which such persons are liable by law to be transported; and that in every such case his majesty, with the advice of his privy council, may appoint any other place beyond the seas in addition to such as had

56 Geo. III. c. 27. Offenders subject to be transported may be transported beyond the seas to such place as the king, with the advice of his privy council, shall appoint.

III. c. 74. to the end or other determination of the terms for which offenders were then confined under its provisions. The 19 Geo. III. c. 74. s. 27. also provided for the changing the punishment of transportation to hard labour, in cleansing the *Thames*, or other navigable rivers, ports, &c. in *England*: but this statute was temporary only, and the 27th section, with many others, after having been continued for some time by different acts, was allowed to expire; *ante*, 570. note (*n*). A recent act, 55 Geo. III. c. 156. also made many provisions respecting the transportation of offenders, or their removal to places of confinement within the kingdom; but its duration was only to the 1st May 1816, except as to its repeal of the 24 Geo. III. c. 56. (*ante*, 571.) in which respect it is continued till the 1st May 1821, by the 56 Geo. III. c. 27. The punishment of persons in *Ireland*, liable to transportation, by confinement and hard labour, was provided for by 51 Geo. III. c. 63.

(*c*) By s. 21. the act is to be in force only to the 1st May 1821.

been theretofore, &c. appointed, to which such offenders shall be transported: and such court is authorized and required to order such offenders to be transferred to the use of any persons or their assigns, who shall contract for the due performance of such transportation. And that when the king shall extend mercy to any offenders convicted of any crimes excluded from the benefit of clergy, upon condition of transportation to any place beyond the seas, either for life or a term of years, and such intention of mercy shall be signified by a principal secretary of state, the court may allow such offenders the benefit of a conditional pardon, and order them to be transported for such term of life or years as shall be specified in the condition, and may make such order of transfer as aforesaid; and that the judge before whom the offenders are convicted, or any justice of the King's Bench, Common Pleas, or baron of the Exchequer, of the degree of the coif, in case such offenders are tried in *England*, or any justice of *Chester* or *Wales*, in case such offenders are tried within their jurisdictions, shall, on such intention of mercy being signified to him by a principal secretary of state, make an order for the immediate transportation of such offenders, and for such offenders to be so transferred, in the same manner as if such intention of mercy had been signified during the continuance of the assizes or sessions at which such offenders were condemned; and that the order shall be as effectual as any order of transportation made during the continuance of the assizes or sessions. (*d*) The statute then makes different provisions respecting the persons contracting for the transportation and the securities which they are to give for the due performance of it, before the offenders are delivered to them for that purpose; (*e*) and enacts, "that the person or persons so contracting as afore-"said, and to whom any offender or offenders shall be deli-"vered in order to be transported, or any person or persons "directed by the justices (empowered to contract as men-"tioned in the act) or their assigns, may, in such manner as

And offenders convicted of crimes excluded from clergy, to whom the king shall extend mercy on condition of transportation beyond the seas, may be ordered to be transported according to such condition.

Persons rescuing such offenders, or assisting them to escape, from those who have

(*d*) 56 Geo. III. c. 27. s. 3. (*e*) *Id.* s. 3, 4, 5, 6.

" they shall think fit, carry and secure the said offenders in " and through any county of *Great Britain*, towards the " sea-port or place from whence they are to be transported; " and if any person or persons shall rescue such offenders, " or any of them, or assist them or any of them in making " their escape from such person or persons as shall have " them in their custody as aforesaid, he, she, or they, shall " be adjudged guilty of felony, and shall suffer death as in " cases of felony, without benefit of clergy." (*f*)

them in custody, guilty of felony without clergy.

The statute then enacts, that if any offenders so ordered by such court to be transported, or who, having agreed to transport themselves on certain conditions, either for life or years, under the provisions of any act or acts of parliament, to any such place as shall have been, or shall be, so appointed by his majesty, " shall be afterwards at large within any " part of the united kingdom of *Great Britain* and *Ireland*, " without some lawful cause, before the expiration of the " term for which such offender or offenders shall have been " ordered to be transported, or shall have so agreed to " transport himself or herself as aforesaid," every such offender being convicted shall suffer death, as in cases of felony without benefit of clergy. (*g*) Provision is made for the trial of such offenders in the county, &c. where they shall be apprehended, or from whence they were ordered to be transported: and that the officer having the custody of the records where such order of transportation shall be made shall give a certificate in writing signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offenders, and of the order for their transportation, to the justices of assize, &c. where such offenders shall be indicted; and that such certificate shall be sufficient proof of the conviction and order for the transportation of such offenders. (*h*)

56 Geo. III. c. 27. s 8. Offenders ordered to be transported, or having agreed to transport themselves, and afterwards being at large before the expiration of their sentence, to suffer death without clergy.

Trial.

Evidence of the former conviction, and order for transportation.

(*f*) 56 Geo. III. c. 27. s. 7.

(*g*) *Id.* s 8.

(*h*) *Id. Ibid.* And a reward of 20*l.* is given for every offender prosecuted to conviction.

56 Geo. III. c. 27. s. 9. 12. 13. Male offenders may be removed to places of confinement in *England* or *Wales*, and placed under the custody of a superintendant or overseer.

The statute then proceeds to authorize the removal of male offenders to places of confinement in *England* or *Wales*. The ninth section enacts, that it shall be lawful for the king, from time to time, by an order in writing, to be notified by one of the principal secretaries of state, or for any three or more justices of the peace, authorized by the king under his sign manual, to direct the removal of any male offenders under sentence of death but reprieved during pleasure, or under sentence or order of transportation; and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from infectious distemper, and fit to be removed from the gaol or prison in which such offenders shall be confined to such place of confinement within *England* or *Wales*, either at land or on board any vessel in any river, or within the limits of any port or harbour of *England* or *Wales*, as the king or such justices shall from time to time appoint, under the management of a superintendant and overseer, to be appointed by the king, or the justices so authorized; and that every offender so removed shall continue in the said place of confinement, or be removed to and confined in any other such place as the king, or such justices, from time to time shall appoint, until such offender shall be transported, or be entitled to his liberty, or until the king or such justices shall direct the return of such offender to the gaol or prison from which he shall have been so removed. (*i*) It is then provided that the superintendant or overseer, having the custody of any such offender, shall have the same powers over him as are incident to the office of a sheriff or gaoler, and in like manner be answerable for his escape: (*j*) and that, upon the misbehaviour or disorderly conduct of any offender, during such custody, the superintendant or overseer may inflict such moderate punishment as may be inflicted on persons committed to a house of correction. (*k*)

And offenders escaping from such custody, and persons

And the statute then enacts, "That if any such offender shall break "from, or unlawfully escape from the custody of such su-

(*i*) 56 Geo. III. c. 27. s. 9. (*j*) *Id.* s. 12. (*k*) *Id.* s. 13.

" perintendant or overseer, or if any person shall rescue, or " assist in rescuing any such offender from such custody, or " shall convey, or cause to be conveyed, any disguise, in- " strument for effecting escape, or arms to such offender, " every such offence shall be punishable in the same manner " as if such offender had been confined in a gaol or prison, " in the custody of the sheriff or other gaoler, for the crime " of which such offender shall have been convicted." (*l*)

rescuing them, &c. are to be punished as if such offenders had been confined in a gaol or prison.

A subsequent section of the statute enacts, that where any order, made for the transportation of any offender beyond the seas, cannot be conveniently executed with respect to the place mentioned in such order, the court of King's Bench, or, (in the vacation,) any two justices of the King's Bench, or Common Pleas, or two barons of the Exchequer, of the degree of the coif, may order that such offender shall be transported to any other place beyond the seas, appointed by the king, in the like manner, and for the same term of years as in the original sentence; and that such order shall be considered as made at the same time, and be as effectual, and have the same consequences in every respect as the original order for the transportation of such offender; and that such offender shall be transferred to any person contracting for the performance of the transportation, and his assigns, in like manner as if he had been transported to the place mentioned in the original order. " And in case any such offender so ordered " for transportation shall be afterwards at large, within any " part of *Great Britain*, without some lawful cause, before " the expiration of the term for which such offender shall " have been ordered to be transported, every such offender, " being convicted, shall suffer death, as in cases of felony, " without benefit of clergy; and shall be tried before such " judges, and in such manner, and the same evidence made " use of for his or her conviction, as is, or shall be directed " by the laws now in being, or hereafter to be made for the " trial of other offenders who shall be at large within this

56 Geo. III. c. 27. s. 16.—Where an offender is ordered to be transported beyond the seas to a particular place, the place may be changed by order of the court of K. B., or two judges.

And any offender so ordered for transportation, and afterwards being at large without lawful cause, is to suffer death without clergy, trial, and evidence.

(*l*) 56 Geo. III. c. 27. s. 13.

"kingdom before the expiration of the term for which they "were ordered to be transported." (*m*)

56 Geo. III. c. 63. Convicts sentenced to transportation may be confined in the general Penitentiary at *Millbank*.

By the 56 Geo. III. c. 63., which was passed for the purpose of regulating the *general Penitentiary* for convicts, lately erected (*n*) at *Millbank*, in the county of *Middlesex*, it is enacted, that when the Penitentiary shall be completed for the reception of convicts, the king, by an order in writing, to be notified by the principal secretary of state for the home department, may direct that any person under sentence or order of transportation for any offence committed in *England* or *Wales*, and who, having been examined by an experienced surgeon or apothecary, shall appear to be free from infectious distemper, and fit to be removed, shall be removed to the Penitentiary, there to continue for five years, in case such convict shall be under sentence or order of transportation for seven years only; and for seven years, in case such convict shall be under such sentence or order for fourteen years; and for ten years, in case such convict shall be under such sentence or order for life. (*o*) And certain regulations are made as to the time of confinement in the Penitentiary, where the convicts have, previously to their removal thither, been kept confined in some other prison, during a part of their term of transportation. (*p*) The statute subsequently makes provision respecting such convicts breaking prison or escaping, and respecting persons rescuing, or attempting to rescue them, or supplying means of escape.

56 Geo. III. c. 63. s. 43. Convicts confined in the Penitentiary breaking pri-

By s. 43. it is enacted, "that if any convict who shall be "ordered to be confined in the said *Penitentiary* shall, at any "time during the term of such confinement, break prison, or "escape from the place of his or her confinement, or in his

(*m*) 56 Geo. III. c. 27. s. 16. A reward of 20*l.* is given for every such offender prosecuted to conviction.

(*n*) It was erected under the provisions of the 52 Geo. III. c. 44.

(*o*) 56 Geo. III. c. 63. s. 13.

(*p*) *Id.* s. 14.

" or her conveyance to such place of confinement, or from " the person or persons having the lawful custody of such " convict, he or she so breaking prison or escaping, shall be " punished by an addition of three years to the term for " which he or she, at the time of his or her breach of prison " or escape, was subject to be confined; and if such convict " so punished by such addition to the term of confinement " shall afterwards be convicted of a second escape or breach " of prison, he or she shall be adjudged guilty of felony, " without benefit of clergy."

son or escaping, are to be punished by an addition of three years to the term of their confinement; and, upon a second breach of prison or escape, to be guilty of felony without clergy.

By s. 44. it is enacted, " that if any person shall rescue " any convict who shall be ordered to be confined within the " said *Penitentiary*, either during the time of his or her " conveyance to the said Penitentiary, or whilst such con- " vict shall be in the custody of the person or persons under " whose care and charge he or she shall be so confined; or " if any person shall be aiding or assisting in any such res- " cue, every such person so rescuing, aiding, or assisting, " shall be guilty of felony, and may be ordered to be con- " fined in the said Penitentiary, for any term not less than " one year, nor exceeding five years; and if any person " having the custody of any such convict as aforesaid, or " being employed by the person having such custody as a " keeper, under-keeper, turnkey, assistant, or guard, shall " voluntarily permit such convict to escape; or if any per- " son whatsoever shall, by supplying arms, tools, or instru- " ments of disguise, or otherwise be in any manner aiding " and assisting to any such convict in any escape, or in any " attempt to make an escape, though no escape be actually " made, or shall attempt to rescue any such convict, or be " aiding and assisting in any such attempt, though no rescue " be actually made, every such person so permitting, at- " tempting, aiding, or assisting, shall be guilty of felony; " and if any person having such custody, or being so em- " ployed by the person having such custody as aforesaid, " shall negligently permit any such convict to escape, such " person so permitting shall be guilty of a misdemeanor;

56 Geo. III. c. 63. s. 44. Persons rescuing convicts ordered to be confined in the Penitentiary, or aiding in such rescue, to be guilty of felony, and confined in the Penitentiary. And persons having the custody of such convicts, and voluntarily permitting an escape, and other persons aiding or attempting any escape or rescue, to be guilty of felony. And any person having such custody, and negligently permitting an escape, to be guilty of a misdemeanor.

" and, being lawfully convicted of the same, shall be liable " to fine or imprisonment, or to both, at the discretion of " the court."

56 Geo. III. c. 63. s. 45. Trial for such offences.

The 45th section relates to the more ready and effectual trial and conviction of persons committing offences within the act; and provides that any convict so escaping, breaking prison, or being rescued, may be tried either in the county where he shall be apprehended and retaken, or in the county in which the said offence shall have been committed; and that, in case of any prosecution for such escape, attempt to escape, breach of prison, or rescue, either against the convict escaping, or attempting to escape, or having broken prison, or being rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a copy properly attested, of the order of commitment to such Penitentiary, shall, (after proof made that the person then in question before the court is the same that was delivered with such order,) be sufficient evidence to the court and jury that the person then in question was so ordered to such confinement.

Evidence of the order of commitment to such Penitentiary.

56 Geo. III. c. 10. Mutiny Act—provides for the punishment of persons returning from transportation after sentence by a court-martial.

The *mutiny acts* also make provision for the punishment of persons returning from transportation after sentence by a *court-martial*. By the last of these acts, 56 Geo. III. c. 10. where a non-commissioned officer or soldier is convicted of desertion, and the court-martial shall not think the offence deserving of capital punishment, they may, instead of a corporal punishment, adjudge the offender to be transported for life, or a term of years; and in all cases wherein a capital punishment shall have been awarded by a court-martial, the king may order the offender to be transported as a felon, for life or for a term of years. And if such non-commissioned officer or soldier, or any person so transported in pursuance of such order from the king, " shall afterwards, " (without leave from his majesty, or from the governor or " commanding officer of the place to which he shall have " been transported,) return into, or be found at large, with-

" out leave as aforesaid, or other lawful cause, within any " part of *Great Britain* or *Ireland*, or in any of his ma- " jesty's possessions abroad, other than the place to which " he shall have been transported, before the expiration of " the term limited by such sentence or order, and shall be " duly convicted thereof, he shall suffer death as a felon, " without benefit of clergy." (*q*) By the ninth section of the statute, amended by the 56 Geo. III. c. 119., upon the sentence of transportation being notified in writing by the commander in chief, or, in his absence, by the adjutant-general, to any justice of the King's Bench, or Common Pleas, or baron of the Exchequer, such justice or baron is to make an order for the transportation of the offender, upon the terms and for the time which shall be specified in such notification: (*r*) and such order, made under any act or acts of parliament, in force at the time of making such order, in relation to the transportation of offenders, and every act consequent upon such order, are to be as effectual, and have all the same consequences, as any order made, or act done, under the authority of any act or acts of parliament in force at the time, in relation to the transportation of offenders, with respect to any offender in any such act or acts of parliament mentioned. (*s*)

Provisions of a similar nature are contained in the acts relating to the regulating of the *royal marine forces* while on shore. (*t*)

Returning, &c. after sentence of transportation for particular crimes.

Besides the statutes thus relating generally to returning, or being at large before the term of the sentence of transportation is expired, and the rescuing or assisting in the escape of persons under such sentence, there are others which contain special enactments as to these offences, after sentence of transportation for some particular crime. Thus

(*q*) 56 Geo. III. c. 10. s. 4, 5.
(*r*) 56 Geo. III. c. 10. s. 9.
(*s*) 56 Geo. III. c. 119.
(*t*) 56 Geo. III. c. 11. 55 Geo. III. c. 21. 54 Geo. III. c. 31. 53 Geo. III. c. 25.

After sentence of transportation for bigamy.

the 35 Geo. III. c. 67. which subjects parties convicted of bigamy to the penalties inflicted for larceny, enacts, "that "if any person ordered to be transported by virtue of that "act shall be afterwards at large within *Great Britain*, "without some lawful cause, before the expiration of the "term," such person being convicted, shall suffer death as a felon, without benefit of clergy. (*u*) Such provisions are contained also in many of the statutes relating to the resisting and evading the revenue laws. (*v*) And other enactments of the same kind will be noticed as they occur in the course of the work.

After sentence of transportation for offences against the revenue laws.

Points decided upon some of the statutes.

The following points appear to have been decided respecting the returning from transportation, or being at large without lawful excuse before the expiration of the term for which the party was sentenced to be transported.

Evidence.

Where the prisoner had received a pardon on condition of transporting himself *beyond the seas*, within fourteen days from the day of his *discharge*, and it was incumbent on the prosecutor to prove the precise day on which the prisoner was discharged, it was holden that the daily book of the prison, containing entries of the names of the criminals brought to the prison, and the times when they were discharged, though generally made from the information of the turnkeys, or from their endorsements on the backs of the warrants, was good evidence to prove the time of the pri-

(*u*) 35 Geo. III. c. 67. s. 2. The third sect. enacts, that such offenders may be tried either in the county where they were convicted, and ordered to be transported, or in such county (within *England* or *Wales*) where they are apprehended; and that in the latter case, the person having the custody of the records of the court by which any such person was ordered to be transported, shall certify a transcript, briefly containing the tenor and effect of the record of the indictment, verdict, and judgment, against such person; and that the certificate shall be sufficient evidence of the indictment, verdict, and judgment, contained in such record.

(*v*) *Ante*, 170, 171, 173, 178.

soner's discharge. (*w*) And it has been holden, that though, if a convict on his trial for returning from transportation before his time was expired confess the fact, and acknowledge that he is the man, the court will record such confession; yet, if no such confession be made, it will be necessary to produce the record of conviction, and give evidence of the prisoner's identity. (*x*)

Evidence of a sign manual.

When a convict was sentenced to transportation for seven years, and received a *sign manual*, promising him a pardon, "on condition of his giving a security to transport himself "for that period within fourteen days," and upon his giving such security was discharged from prison, but neglected to transport himself within the fourteen days, it was holden that he could not be indicted for being unlawfully found at large before the term for which he had received sentence of transportation had expired; on the ground that such sign manual and the recognizance entered into in consequence of it were good evidence that he was *lawfully* at large; although he had not substantially performed the condition on which the promise of pardon was granted. (*y*)

(*w*) Aickles's case, 1 Leach 391, 392.

(*x*) 1 Hawk. P. C. c. 47. *Return from Transp.* s. 21. The later statutes have provided for a short transcript of the record in certain cases. See *ante*, 567, 568, 577.

(*y*) Miller's case, 1 Hawk. P. C. c. 47. *Return from Transp.* s. 22. Cas. C. L. 69. 1 Leach 74. 2 Blac. R. 797. It appears that the judges considered, that the sign manual was improperly worded by mistake of the officer: that it should have been, "upon condition of the said "Miller transporting himself, &c. "and of his giving security to the "satisfaction, &c." and not merely "upon condition of his giving security, &c." And that though the king might revoke his intended grace on account of this apparent fraud; yet, as he had not in fact revoked it, and as the prisoner had *literally* complied with the condition, he ought not to have been convicted upon an indictment for being found at large, *without any lawful cause*, before the expiration of his term. With respect, however, to a condition being considered *precedent* or *subsequent*, it has been holden that no precise technical words are requisite for that purpose; that it does not depend upon its being *prior* or *posterior* in the deed, but that it depends upon the nature of the contract,

As to the offender being referred to his original sentence of transportation.

In the last case the prisoner was referred to his original sentence of transportation, as not having performed the condition upon which his pardon was to be granted; that is, he was pardoned on condition of transporting himself within fourteen days. (*z*) And in another case it was holden, that a prisoner convicted of a capital crime, whose sentence was respited during the king's pleasure, and who, having received a pardon on condition of transportation for life, was afterwards found at large in *Great Britain* without lawful cause, should be referred to his original sentence. (*a*) In a subsequent case, where the prisoner, having been convicted of simple grand larceny, had received judgment of transportation to *America* for seven years, but had afterwards been pardoned, "on condition of transporting himself *be-*

and the acts to be performed by the parties. Robinson *v.* Comyns, Cas. Temp. Talb. 166. Hotham *v.* the East India Company, 1 T. R. 645.

(*z*) Miller's case, 1 Leach 76.

(*a*) Madan's case, Old Bailey, 1780, 1 Leach 223. In 1 Hawk. P. C. c. 47. *Return from Transp.* s. 23. (referring to Cas. C. L. 197.) this case is cited as having decided that the prisoner was so referred back to his original sentence on his being indicted for returning from transportation and acquitted. But in the report in Leach, it is said that no indictment was ever preferred against the prisoner for the new felony; but that, being in custody, a notice was served upon him, to shew cause why execution should not be awarded against him on his former sentence: that after this notice he was put to the bar, and his identity and the record of his former conviction proved; and he not being prepared to prove the truth of certain facts alleged in his defence, the court gave their opinion that, as he had broken the condition of the pardon, he remained in the same state in which he was at the time the pardon was granted, viz. under sentence of death, with a respite of that sentence during his majesty's pleasure. The report further states, that afterwards it was submitted to the judges, whether the prisoner would not have been liable to suffer death without benefit of clergy, if he had been indicted and convicted under the statute 8 Geo. III. c. 15. (*ante*, 568.) or whether he had been properly referred to his original sentence. No opinion of the judges is stated; but it appears, that at the Old Bailey, April Sess. 1782, the prisoner was informed by the court that it was his majesty's pleasure that he should be transported to *Africa* for life.

" *yond the seas* for the same term of years, within fourteen " days from the day of his discharge, and of giving security " so to do," and, upon giving the security required, had been discharged, but had not complied with the other part of the condition, by transporting himself, it was doubted whether he could be convicted of a capital felony in being found at large, *without any lawful cause*, before the expiration of the term, or whether he ought to be remitted to his former sentence. The former cases were cited as authorities that the prisoner's discharge was a *lawful cause* for his being at large, notwithstanding he had forfeited the recognizance of himself and his bail, by breaking the other part of the condition, in not transporting himself within the fourteen days: but one of the judges thought that, as the prisoner had not complied with the terms on which he was pardoned, he must be considered as having been at large without lawful authority, as soon as the fourteen days had expired. Another judge considered it as a doubtful question whether the non-performance of the condition had not rendered the whole pardon null and void: and he also thought that the offence with which the prisoner was charged was not within the statute 16 Geo. II. c. 15.(*b*) because he had not agreed to transport himself to *America;* and that it was not within the 19 Geo. III. c. 74.(*c*) because that act relates only to pardons granted to offenders who have been convicted of felonies by which they are excluded from clergy. (*d*)

(*b*) *Ante*, 567, 568.

(*c*) *Ante*, 569, 570.

(*d*) Aickles's case, Old Bailey, 1785.—*cor.* Gould, J. Hotham, B. and Adair, Recorder. The Recorder thought, that the indictment was perfectly supported under the clause of the 16 Geo. II. c. 15. (*ante*, 567.) adopted by 19 Geo. III. c. 74. (*ante*, 569.) which makes it a capital felony to be found at large in Great Britain within the term for which a convict, who was liable to be transported to *America*, had received sentence to be transported *beyond the seas*. But he thought, that when the condition of the king's pardon was broken, the pardon was gone. There being, however, a difference of opinion, it was intended to have submitted the case to the opinion

Poverty and ill health amount to a lawful excuse for not having quitted the kingdom.

In the last mentioned case one point was clearly agreed upon, namely, that as the prisoner had, at the time of his discharge, a real intention to quit the kingdom within the time, but had been prevented from carrying it into execution by the distress of poverty and ill health, these impediments amounted to *a lawful excuse*. (*e*)

of the twelve judges, if the prisoner had been found guilty.

(*e*) Aickles's case, 1 Leach 396. and see Thorpe's case, *id. ibid.* note (*a*).

CHAPTER THE THIRTY-SEVENTH.

Of Incorrigible Rogues.

IDLENESS, in any person whatsoever, has been considered as a high offence against the public œconomy; and idle persons or vagrants are regarded in this, as in other countries, as offenders against the good order and welfare of the community. (*a*) They are, by the statute 17 Geo. II. c. 5. which is commonly called the Vagrant Act, particularly described, and divided into three classes, namely, *idle* and *disorderly* persons, *rogues* and *vagabonds*, and *incorrigible rogues;* and, by that and other statutes, made punishable by summary proceedings before justices of the peace, which do not come within the limits of this treatise. (*b*) The statute 17 Geo. II. c. 5. contains, however, certain provisions, which may be properly noticed in this place, as in some cases they make the offences of an *incorrigible rogue*, of the degree of felony, and punishable by transportation.

Idle persons, or vagrants, are offenders against the welfare of the community.

The ninth section of the statute enacts, that where any offender against the act shall be committed, in the manner therein mentioned, to the house of correction, there to remain until the next general or quarter sessions; and the justices at such sessions shall, on examination of the circumstances of the case, adjudge such person a rogue or vagabond, or an incorrigible rogue; they may, if they think convenient, order such rogue or vagabond to be detained and kept in the said house of correction to hard labour, for any further time not exceeding six months; and such incorrigi-

17 Geo. II. c. 5. s. 9. Rogues and vagabonds, and incorrigible rogues, may be confined in the house of correction, and whipped.

(*a*) 4 Blac. Com. 168. Burn. Just. *Vagrants.*

(*b*) For these proceedings see 5

ble rogue, for any further time not exceeding two years, nor less than six months, from the time of making such order of sessions; and during the time of such person's confinement, to be corrected by whipping, in such manner, and at such times and places within their jurisdictions, as, according to the nature of such person's offence, they in their discretion shall think fit. And after providing for sending such person away by a pass, or into his majesty's service, if the justices at sessions shall think proper, it enacts that "in case "any such incorrigible rogue, so ordered by the said "general or quarter sessions to be detained and kept in "the said house of correction, shall, before the expiration "of the time for which he or she shall be so ordered to be "there detained and kept, break out or make his or her "escape from the said house of correction, or shall offend "again in like manner; in every such case, every such per- "son shall be deemed and taken to be guilty of felony, and "being legally convicted thereof, shall and may be trans- "ported for any time not exceeding seven years, in the "same manner as by the laws now in being other felons "may be transported."

And if an incorrigible rogue so confined break out, or escape, or offend again in like manner, he is to be deemed guilty of felony and transported.

Ballie's case. A party convicted under a subsequent statute, 23 Geo. III. c. 88. as a rogue and vagabond, and offending again, may be indicted on this statute of 17 Geo. II. c. 5.

It has been holden in a case upon this statute, that a person committed as a rogue and vagabond, under an act of the 23 Geo. III. c. 88. (*c*) who breaks gaol, and, on being committed as an incorrigible rogue under this statute, breaks gaol a second time, and then commits a new act of vagrancy as a *rogue and vagabond*, may be indicted for felony, and punished by transportation. (*d*) The indictment in this case stated, that the prisoner had been committed by a justice, and convicted by the sessions as a *rogue and vagabond* under the 23 Geo. III. c. 88. and having been committed for six months, had escaped, &c. that afterwards he had been convicted for that escape and committed as *an incorrigible rogue*, and that he had again broken gaol before the expiration of the time, &c.; and then it charged that he,

(*c*) *Ante*, 64. (*d*) Ballie's case, 1 Leach 396.

on such a day, did offend again *in like manner* as a *rogue and vagabond*, in having upon him a certain offensive weapon called a pistol, with intent feloniously to assault some person or persons against the peace, &c. (*e*) The prisoner having been convicted on this indictment, two questions were reserved for the consideration of the judges.

The first question was, whether the offence for which the prisoner was convicted, being enacted by the statute 23 Geo. III. c. 88. could be maintained under an indictment on the statute 17 Geo. II. c. 5. Upon this the judges, referring to the title of the 23 Geo. III. c. 88. namely, "an act to extend the provisions of an act, &c. (setting out the title of the 17 Geo. II. c. 5.) to cases not therein mentioned," were of opinion that the 23 Geo. III. c. 88. must have the same operation as if the offences described in it had been originally inserted in the 17 Geo. II. c. 5. in continuation of the offences therein described; and be in every respect considered as incorporated into, and making a part of, that act. (*f*)

As to the meaning of the words "shall offend again in like manner," in 17 Geo. II. c. 5.

The second question was, whether the words "shall offend again *in like manner*," in the statute 17 Geo. II. c. 5. do not refer to such offences only as bring the offender under the description of *an incorrigible rogue;* and if so, whether the indictment was good in charging the prisoner with having offended *in like manner as a rogue and vagabond*, instead of having offended *in like manner as an incorrigible rogue.* The judges were of opinion, that the indictment was right both in form and substance. Gould, J. in delivering their opinion, said, "The prisoner is committed to the house of correction for six months as a *rogue and vagabond:* by breaking gaol he is guilty of a new act of vagrancy, and is adjudged and committed for two years as an *incorrigible*

(*e*) See the stat. 23 Geo. III. c. 88. *ante*, 64.

(*f*) They said, that though the title of an act of parliament is not to be considered as any part of the act, yet that it may serve to explain the intent and meaning of the legislature.

" *rogue:* from this imprisonment he again makes his escape " before the two years are expired, and commits another " act of vagrancy as a *rogue and vagabond*, against the 23 " Geo. III. c. 88. By this escape he becomes an *incorri-* " *gible rogue* a second time; and he afterwards offends " again '*in like manner*' as a rogue and vagabond. All " these facts are disclosed in the indictment. No technical " terms or words of art are made necessary to the descrip- " tion of this offence. The law, therefore, must draw this " inference from the words, viz. that by having offended " again in like manner as a *rogue and vagabond*, he becomes " *an incorrigible rogue* a second time, and thereby incurs " the guilt of felony. It is, therefore, the unanimous opi- " nion of the judges, that the indictment is proper, and that " the prisoner is in the predicament which the legislature " has said shall be punished with transportation." (*g*)

(*g*) Ballie's case, 1 Leach 400.

CHAPTER THE THIRTY-EIGHTH.

Of Gaming.

Playing at cards, &c. as a recreation, and for moderate sums, is not any offence. But otherwise as to *gaming*.

IT seems that, by the common law, the playing at cards, dice, &c. when practised innocently and as a recreation, the better to fit a person for business, is not at all unlawful, nor punishable as any sort of offence: but a person guilty of cheating, as by playing with false cards, dice, &c. may be indicted for it at common law, and fined and imprisoned according to the circumstances of the case, and heinousness of the offence. (*a*) We have seen that common gaming-houses are considered as nuisances in the eye of the law; (*b*) and that lotteries have been declared to be public nuisances, except as they may have been authorized by parliament. (*c*) And when the playing is, from the magnitude of the stake, excessive, and such as is now commonly understood by the term *gaming*, it is considered by the law as an offence, being in its consequences most mischievous to society. In most cases, however, the party is subjected only to pecuniary penalties, recoverable by information, or by summary or civil proceedings; but some offences may be mentioned, which, by statutable enactments, may be prosecuted by indictment. (*d*)

(*a*) 3 Bac. Abr. *Gaming* (A) 2 Roll. Abr. 78.

(*b*) *Ante*, 433, 434.

(*c*) *Ante*, 440. And a late statute 42 Geo. III. c. 119. declares all games or lotteries, called *Little Goes*, to be public nuisances, and provides for their suppression; and also imposes heavy penalties upon persons keeping offices, &c. not authorized by parliament.

(*d*) As to the penalties imposed upon persons gaming, or keeping gaming houses, &c. and the proceedings for the recovery of them, see 1 Hawk. P. C. c. 92. 3 Bac. Abr. *Gaming*. 2 Burn. Just. *Gaming*. 4 Blac. Com. 172, 173, 174,

9 Ann. c. 14. s. 5. Persons losing 10*l.* at a sitting may sue for it again, and if the loser does not sue, any other person may recover the same, and treble the value.

The statute 9 Ann. c. 14. s. 5. enacts, that any person who shall at any time or sitting, by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play at any of these games, lose to any one or more person or persons so playing or betting in the whole the sum or value of ten pounds, and shall pay the same, or any part thereof, he may sue for it again within three months, and recover it, with costs, by action of debt; and in case the loser shall not *bonâ fide* sue, any other person may sue for and recover the same, and treble the value thereof, with costs of suit, against the winner. (*e*) The statute then further enacts, that "if any "person or persons whatsoever do or shall, by any fraud "or shift, cousenage, circumvention, deceit, or unlawful "device, or ill practice whatsoever, in playing at or with "cards, dice, or any the games aforesaid, or in or by bear- "ing a share or part in the stakes, wagers, or adventures, "or in or by betting on the sides or hands of such as do or "shall play as aforesaid, win, obtain, or acquire to him or "themselves, or to any other or others, any sum or sums "of money, or other valuable thing or things whatsoever, "or shall at any one time or sitting win of any one or more "person or persons whatsoever, above the sum or value of "ten pounds, that then every person or persons so winning "by such ill practice, as aforesaid, or winning at any one "time or sitting above the said sum or value of ten pounds, "and being convicted of any of the said offences, upon an "indictment or information to be exhibited against him or "them for that purpose, shall forfeit five times the value "of the sum or sums of money, or other thing so won as "aforesaid; and in case of such ill practice, as aforesaid, "shall be deemed infamous, and suffer such corporal pu- "nishment as in cases of wilful perjury; and such penalty

Any person by deceit, &c. winning any monies, &c. or at any one sitting winning above 10*l.* shall forfeit five times the value, and, in case of such ill practice, be deemed infamous, and suffer the punishment of perjury.

and the notes (10) (11), and the statutes 2 Geo. II. c. 28. 12 Geo. II. c. 28. 25 Geo. II. c. 36. s. 5. and 16 Car. II. c. 7.

(*e*) S. 2.

"to be recovered by such person or persons as shall sue "for the same by such action as aforesaid."

By the 18 Geo. II. c. 34. s. 8. "If any person shall win "or lose at play, or by betting, at any one time, the sum "or value of ten pounds, or within the space of twenty-four "hours, the sum or value of twenty pounds, such person "shall be liable to be indicted for such offence within six "months after it is committed, either before the justices "of the King's Bench, assize, gaol delivery, or great ses- "sions; and being thereof legally convicted, shall be fined "five times the value of the sum so won or lost; which fine "(after such charges as the court shall judge reasonable "allowed to the prosecutors and evidence out of the same) "shall go to the poor of the parish, or place where such of- "fence shall be committed." There is then a provision, that if any person so offending shall discover any other person so offending, so that such person be thereupon convicted, the person so discovering shall be discharged and indemnified from all penalties, if such person so discovering has not been before convicted thereof, and shall be admitted as an evidence to prove the same. (*f*)

18 Geo. II. c. 34. s. 8. Any person winning or losing at any one time 10*l.* or within 24 hours 20*l.* may be indicted and fined five times the value.

Offender discovering any other offender to be discharged.

It has been decided that a *foot race*, whether the race be upon a given distance, or against a certain time, is a game prohibited by 9 Ann. c. 14. (*g*) And a wager that a person did not find within such a time a man who should carry on foot twenty-four stone weight ten miles in fifteen hours has been holden to be within the same principle. (*h*) But where A. betted B. that one C. would not run four miles in twenty-one minutes, it was adjudged not to be within the statute, because as C. was not playing at such game, there could be no betting on his side within the statute; for C.

Cases upon the construction of the statute of 9 Anne, c. 14.

(*f*) 18 Geo. II. c. 34. s. 9. And by s. 10. the act is not to repeal or invalidate the 9 Ann. c. 14.

(*g*) Lynall *v.* Longbotham, 2 Wils. 36.

(*h*) Brown *v.* Beckley, Cowp. 282.

might be running for his amusement, and not to win any bet. (*i*) It has, however, been holden, that laying above ten pounds on a *horse race* is an illegal bet within the statute of Anne, on the ground that the statute ought to be extended to all *sports* as well as games, in order to prevent excessive betting. (*k*) And it has been determined, that a wager of ten pounds to five pounds upon a horse race is within this statute, although the race was for a legal plate. (*l*) *Cricket* also, it seems, is an unlawful game within this statute. (*m*) It has been determined also, that if two persons play at cards from *Monday* evening to *Tuesday* evening, without any interruption, except for an hour or two at dinner, and one of them win a balance of seventeen guineas, this is won at one sitting within the statute. (*n*)

It seems that if a loser prefer an indictment against a winner on this statute of Anne, and the grand jury find the bill, the court will not permit an information to be filed against the defendant, although the indictment was quashed,

(*i*) Lynall *v.* Longbotham, 2 Wils. 36.

(*k*) 1 Hawk. P. C. c. 92. s. 52. Goodburn *v.* Marley, 2 Str. 1159. Blaxton *v.* Pye, 2 Wils. 309. And it has been holden, that a wager on a horse race for less than 50*l.* cannot be recovered in an action; the 13 Geo. II. c. 19. s. 2. having prohibited such races. Johnson *v.* Bann, 4 T. R. 1. and see Bidmead *v.* Gale, 4 Burr. 2132. And that a wager, though for more than 50*l.* that the plaintiff could perform a certain journey in a post-chaise and pair of horses in a given time, cannot be so recovered. Ximenes *v.* Jaques, 6 T. R. 499. Nor a like wager, that a single horse should go from A. to B. on the high road sooner than one of two other horses to be placed at any distance their owner should please; these being transactions prohibited by 16 Car. I. c. 7. s. 2. and 9 Anne, c. 14. and not legalized by 13 Geo. II. c. 19. or 18 Geo. II. c. 34. which relate to *bonâ fide* horse-racing only. Whaley *v.* Pajot, 2 Bos. and Pul. 51. And it was ruled that no action can be maintained on a wager on a *cock-fight*. Squires *v.* Whisken, 3 Camph. 140. And see as to the offence of keeping a cock-pit, *ante*, 434.

(*l*) Clayton *v.* Jennings, 2 Blac. R. 706.

(*m*) Jeffreys *v.* Walter, 1 Wils. 220.

(*n*) Bones *v.* Booth, 2 Blac. R. 1226.

and, of course, the defendant never tried upon it; for the grand jury may find another bill for the same offence. (*o*)

It is also settled, that if a defendant be convicted on an information on this statute, the court can only give judgment *quod convictus est*, and cannot set a fine on the offender of five times the value, but that an action must be brought on the judgment to recover the penalty. (*p*) Upon the ground that the judgment of the court is only *quod convictus est*, and is to be the foundation of an action to recover the penalty; it was urged, in a recent case, that it is necessary to prove the sum precisely as laid in the indictment but Lord Ellenborough, C. J. was of opinion that although, if the prosecutor had averred in the indictment that the defendants had won any bills of exchange of a specified amount, the allegation must have been proved as laid; yet that since the sum only was averred, and that under a *videlicet*, the prosecutor was entitled to prove the winning of a smaller sum. (*q*)

(*o*) 1 Hawk. P. C. c. 92. s. 56. Anon. 8 Mod. 187.

(*p*) Rex *v.* Lookup, 2 Str. 1048. The defendant was accordingly discharged without any fine or costs.

(*q*) Rex *v.* Hill, Darley and others, 1 Starkie R. 359. And see Rex v. Gilham, 6 T. R. 265. Rex *v.* Burdett, 1 Ld. Raym. 149. *ante*, 225. Rex *v.* Baynes, 2 Ld. Raym. 1265.

CHAPTER THE THIRTY-NINTH.

Of Usury and Illegal Brokerage.

Usury a contract for exorbitant interest for the use of money.

IT was anciently holden that the taking of any kind of consideration for the loan or forbearance of money was an offence of ecclesiastical cognizance, punishable by severe censures and forfeitures: (*a*) but this notion, which appears to have proceeded from a mistaken construction of some passages in the Mosaical law, (*b*) has long given way to the more reasonable doctrine that there is nothing improper in taking a moderate interest for the use of money. Any large and immoderate consideration for such use has, however, been justly deemed prejudicial to the welfare of society; and the contract to receive any such exorbitant increase is that which is now generally understood by the odious appellation of *usury*.

Offence at common law.

It seems that, at common law, no indictment for usury could be supported, unless it were of such an exorbitant kind as that taken by the Jews. Accordingly, it is laid down in the books, that usury, such as the Jews took, namely, forty per cent. per annum, or more, was an offence at common law; and that, upon conviction, the usurer forfeited his goods to the king, and his lands to the lord of the fee, but that no other usury was so prohibited. (*c*)

(*a*) 1 Hawk. P. C. c. 82. s. 1.

(*b*) Exod. c. 22. v. 25. Levit. c. 25. v. 36, 37. Deuter. c. 23. v. 19, 20.; and see 1 Hawk. P. C. c. 82. s. 7. 2 Blac. Com. 455.

(*c*) 2 Rol. 800, 3 Inst. 151, 152. 6 Com. Dig. *Usury*, (*A.*) *Anon.* Hardr. 410. It is however stated that a very eminent barrister, in the year 1814, advised that, in a case of clear and palpable usury, a party may be indicted at common law. 2 Chit. Crim. L. 549 note (*f*).

Offence by statutes.

Different rates of interest have been established by different nations. In this country also they have been regulated by the legislature; and have varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. By the statute 37 Hen. VIII. c. 9. the rate of interest was fixed at 10*l.* per cent. per annum, which the statute 13 Eliz. c. 8. confirmed, and ordained that all brokers should be guilty of a *premunire* who transacted any contracts for more, and that the securities themselves should be void. The statute 21 Jac. I. c. 17. reduced interest to eight per cent.; and it having been lowered in 1650, during the usurpation, to six per cent., the same reduction was re-enacted after the restoration, by the 12 Car. II. c. 13.; and now, by the statute 12 Ann. st. 2. c. 16. it is reduced to five per cent. A contract, therefore, to take more than five per cent. is at this time usurious, and by the statute of Anne, totally void; besides which, the lender is made liable to the forfeiture of treble the money borrowed.

12 Ann. st. 2. c. 16. s. 1. enacts that no person shall take above 5*l.* per cent. interest.

This statute of Anne enacts, "That no person or persons whatsoever, upon any contract, take, directly or indirectly, for loan of any monies, wares, merchandize, or other commodities whatsoever, above the value of five pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time;" and that all bonds, contracts, &c. whereby there shall be reserved or taken above the rate of five pounds in the hundred, as aforesaid, shall be utterly void; "and that all and every person or persons whatsoever, which shall, upon any contract, take, accept, and receive, by way or means of any corrupt bargain, loan, exchange, chevizance, shift, or interest of any wares, merchandizes, or other thing or things whatsoever, or by any deceitful way or means, or by any covin, engine, or deceitful conveyance, for the forbearing or giving day of payment for one whole year, of and for their money

And that all bonds, &c. for a greater interest shall be void.

And that persons taking above 5*l.* for the forbearance of 100*l.* for a year shall forfeit treble the value of the monies, &c.

" or other thing, above the sum of five pounds for the for-
" bearing of one hundred pounds for a year, and so after
" that rate for a greater or lesser sum, or for a longer or
" shorter term, shall forfeit and lose for every such offence
" the treble value of the monies, wares, merchandizes,
" and other things so lent, bargained, exchanged, or
" shifted."

S. 2. enacts that no scrivener, &c. shall take above 5*s.* for 100*l.* for a year for brokage, &c.; nor above 12*d.* besides stamp duties for making or renewing any bond, &c.; on penalty of 20*l.* and costs, and imprisonment for 6 months.

The second section of this statute further enacts, " that
" all and every scrivener and scriveners, broker and brokers,
" solicitor and solicitors, driver and drivers of bargains
" and contracts, who shall take or receive, directly or indi-
" rectly, any sum or sums of money, or other reward or
" thing for brokage, soliciting, driving, or procuring the
" loan, or forbearing of any sum or sums of money, over
" and above the rate or value of five shillings for the loan
" or forbearing of one hundred pounds for a year, and so
" rateably, or above twelve pence, over and above the stamp
" duties, for making or renewing of the bond or bill for
" loan, or forbearing thereof, or for any counterbond or
" bill concerning the same, shall forfeit for every such of-
" fence twenty pounds, with costs of suit, and suffer im-
" prisonment for half a year; the one moiety of all which
" forfeitures to be to the queen's most excellent majesty, her
" heirs and successors, and the other moiety to him or them
" that will sue for the same in the same county where the
" several offences are committed, and not elsewhere, by ac-
" tion of debt, bill, plaint, or information, in which
" no essoign, wager of law, or protection, shall be al-
" lowed."

As to an indictment being sustainable upon this statute.

The provisions of the 12 Car. II. c. 13. were similar to those of the statute of Anne, which have been just cited, except that the rate of interest was fixed by them at six per cent: and it is reported to have been decided that no indictment would lie upon the statute of Car. II., and that it was necessary for the party prosecuting to sue for the penalties in a penal action; as being the method of proceeding

prescribed by the statute. (*d*) But upon the principles which have been stated in a former part of this work, as to an indictment being sustainable where there is a general prohibitory clause in a statute, though there be afterwards a particular provision and a particular remedy given, it should seem that an indictment will lie upon the statute where an usurious transaction has been carried into effect. (*e*) An indictment for usury has not, however, been a frequent mode of proceeding, as the party prosecuting has, in general, been contented to sue for the heavy penalties given by the statute: and it is clear that an indictment cannot be maintained for a corrupt agreement only; as where such an agreement was stated in an indictment for usury, without any loan, or taking excessive interest in pursuance of it, judgment was arrested. (*f*)

Justices of peace have no jurisdiction on an indictment for usury.

As to an information by the court of K. B.

It was holden, that justices of the peace at their quarter sessions had no jurisdiction upon an indictment on the statute of 12 Car. II. (*g*) And with respect to an information on the statute of 12 Anne, it has been holden that the court of King's Bench will not grant it after the time has elapsed within which the common informer should institute his proceedings; on the ground that where a penalty has vested in the crown only, the court have no power to grant an information, but must leave it to the attorney-general to file one if he shall think proper. (*h*)

(*d*) Reg. *v.* Dye, (7 Anne,) 11 Mod. 174. The case is very shortly reported, and does not state upon which section of the statute the question was raised: but the editor of the Reports, (*ed.* 1796,) has cited many authorities in support of the decision, as to the applicability of some of which *qu.* Reg. *v.* Dye is however cited as law in 7 Bac. Abr. *Usury*, (*i.*)

(*e*) *Ante*, 65. *et sequ.* And see 2 Chit. Crim. L. 549, note (*f*).

(*f*) Rex *v.* Upton, 2 Str. 816.

(*g*) Reg. *v.* Smith, (4 Anne.) 2 Salk. 680. 2 Lord Raym. 1144. S. C.

(*h*) Rex *v.* Hendricks, 2 Str. 1234. By the 31 Eliz. c. 5. s. 5. the common informer is limited to a year after the offence committed; and, if no such suit is brought

Form of indictment.

It is said that an indictment for usury, (supposing it to be sustainable,) must contain all the requisites of a declaration for usury. (*i*)

Evidence.

If the transaction were effected by means of some device, or colourable pretence, it must be left to the jury to say whether the sum taken, though ostensibly for another purpose, was not in reality taken as usurious interest. (*k*)

17 Geo. III. c. 26. s. 6. makes contracts for annuities with any person under 21 years void: and enacts, that any person who shall procure or solicit any minor to grant an annuity, &c. shall be guilty of a misdemeanor, and punished by fine and imprisonment, &c.

The 17 Geo. III. c. 26. s. 6. makes all contracts void which are made, for the purchase of any annuity, with any person under twenty-one years of age. And it further enacts, "That if any person shall, either in person, by letter "agent, or otherwise howsoever, procure, engage, solicit, "or ask any person, being under the age of twenty-one "years, to grant, or attempt to grant, any annuity or rent-"charge, or to execute any bond, deed, or other instru-"ment, for securing the same; or shall advance or procure, "or treat for any money to be advanced to any person un-"der the age of twenty-one years, upon consideration of "any annuity or rent-charge, to be secured or granted by "such infant, after he or she shall have attained his or her "age of twenty-one years; or shall induce, solicit, or pro-

within the year, then the crown may sue at any time within two years after the end of the first year.

(*i*) 2 Chit. Crim. L. 549. note (*f*). In an action for usury, the averment of the quantum of the excess taken is material. But some of the reasons for that accuracy, namely, that the penalty is apportioned to the value, and that the judgment depends upon the quantum taken, do not apply to the proceeding by indictment. It may, however, be said, on the other hand, that, as the contract must be set forth in the indictment, the general rule of pleading will apply: namely, that in setting forth a contract it is necessary to set it forth correctly, and prove it as set forth.

(*k*) Per Grose, J. in Rex *v.* Gillham, 6 T. R. 268. See further as to the points decided concerning usury, and the proceedings for the recovery of the penalties, 1 Hawk. P. C. c. 82. 6 Com. Dig. *Usury*. 7 Bac. Abr. *Usury*. 2 Blac. Com. 455. *et sequ.* 4 Blac. Com. 156, 157.

" cure any infant, upon any treaty or transaction for money " advanced, or to be advanced, to make oath, or to give his " or her word of honour, or solemn promise, that he or she " will not plead infancy, or make any other defence against " the demand of any such annuity or rent-charge, or the re- " payment of the money advanced to him or her when " under age; or that when he or she comes of age, he " or she will confirm or ratify, or in any way sub- " stantiate such annuity or rent-charge;" every such person shall be guilty of a misdemeanor, and being convicted in any court of assize, oyer and terminer, or general gaol delivery, shall be punished by fine, imprisonment, or other corporeal punishment, as the court shall think fit to award.

17 Geo. III. c. 26. s. 7.— Solicitors, &c. taking more than ten shillings in the 100*l.* for brokerage, &c. made guilty of a misdemeanor, punishable by fine and imprisonment.

The 7th section of the statute enacts, " that all and every " solicitor and solicitors, scrivener and scriveners, brokers " and broker, and other persons or person, who shall ask, " demand, accept, or receive, directly or indirectly, any sum " or sums of money, or any other kind of gratuity or re- " ward, for the soliciting or procuring the loan, and " for the brokerage of any money that shall be actu- " ally and *bonâ fide* advanced and paid, as and for the " price or consideration of any annuity or rent-charge, " (as mentioned in the former sections of the act,) over " and above the sum of ten shillings for every 100*l.* " so actually and *bonâ fide* advanced and paid, shall be " deemed and adjudged guilty of a misdemeanor;" and, being convicted in any court of assize, oyer and terminer, or general gaol delivery, shall, for every such offence, be punished by fine and imprisonment, or one of them, at the discretion of the court. And the persons who shall have paid any sum or sums of money, gratuity or reward, are made competent witnesses to prove the same. (*l*)

Persons having paid any sum, &c. may prove the same.

(*l*) 17 Geo. III. c. 26. s. 7.

Cases to which this act is not to extend.

This act, however, is not to extend to any annuity or rent-charge given by will, or by marriage settlement, for the advancement of a child; nor to any annuity or rent-charge secured upon lands of equal or greater annual value, whereof the grantor was seized in fee simple or in fee tail, in possession at the time of the grant, or secured by the actual transfer of stock in any of the public funds, the dividends whereof are of equal or greater annual value than the said annuity; nor to any voluntary annuity granted without regard to pecuniary consideration; nor to any annuity or rent-charge granted by any body corporate, or under any authority or trust created by act of parliament; nor to any annuity where the sum to be paid does not exceed ten pounds annually, unless there be more than one such last-mentioned annuity from the same grantor to, or in trust for, the same person. (*m*)

On an indictment on this statute it is not necessary to prove the exact sum laid: and the jury must consider whether the monies were taken as a fair charge, or as a device to avoid the statute.

Upon an indictment on the seventh section of this statute, for taking more than ten shillings in the 100*l.* for brokerage, &c. it was objected at the trial that the evidence did not sustain the indictment; the charge being that 322*l.* 10*s.* was paid for brokerage of the sum of 2450*l.*, and the evidence being that the defendant, at the time of the money being paid, said that 100*l.* was for the writings, (he being an attorney, and having produced them,) 100*l.* by way of present, and 5*l.* per cent. on the whole sum, viz. 122*l.* 10*s.* *Lord Kenyon*, C. J. over-ruled the objection; and, upon the whole case, directed the jury to consider whether the transaction were not a mere device and colour to receive the sum stated under different pretences, but in truth for the brokerage and soliciting of the loan, in fraud of the act of parliament. This decision was confirmed by the court, who were of opinion that the material question was, whether more than ten shillings in the 100*l.* was taken by the defendant; and that it was not necessary to prove that he

(*m*) 17 Geo. III. c. 26. s. 8.

took the exact sum laid in the indictment, though it was not laid with a scilicet. (*n*)

(*n*) Rex *v.* Gillham, 6 T. R. 265. and at N. P. 1 Esp. R. 285. As to the point of the proof of the exact sum not being necessary, see Rex *v.* Burdett, 1 Lord Raym. 149. *ante*, 225.; and Rex *v.* Hill and others, 1 Starkie, R. 359. *ante*, 597.

CHAPTER THE FORTIETH.

Of Offences relating to Dead Bodies.

Taking up dead bodies, even for the purposes of dissection, is an indictable offence.

IT has been holden that it is an indictable offence to take up a dead body, even for the purpose of dissection. Upon an indictment for this offence it was moved, in arrest of judgment, that if it were any crime, it was one of ecclesiastical cognizance only; that it was not made penal by any statute; and that the silence of *Stamford*, *Hale*, and *Hawkins*, upon the subject, afforded a very strong argument to shew that there was no such offence cognizable in the criminal courts. But the Court said, "that common decency "required that the practice should be put a stop to: that "the offence was cognizable in a criminal court, as being "highly indecent, and contrà bonos mores; at the bare idea "alone of which nature revolted. That the purpose of "taking up the body for dissection did not make it less an "indictable offence: and that, as it had been the regular "practice of the *Old Bailey*, in modern times, to try charges "of this nature, many of which had induced punishment, "the circumstance of no writ of error having been brought "to reverse any of these judgments, was a strong proof of "the universal opinion of the profession upon this subject; "and they, therefore, refused even to grant a rule to shew "cause, lest that alone should convey to the public an idea "that they entertained a doubt respecting the crime al-"leged." (*a*)

(*a*) Rex *v.* Lynn, 2 T. R. 733. 1 Leach 497. 2 East P. C. c. 16. s. 89. p. 652. The defendant was only fined five marks, on the ground that he might possibly have committed the crime merely from ignorance, as no person had been before punished for the offence in that court. In 4 Blac. Com. 236, 237. stealing a corpse is mentioned as a

The refusal or neglect to bury dead bodies by those whose duty it is to perform the office, appears also to have been considered as a misdemeanor. Thus Abney, J. in delivering the opinion of the court of Common Pleas, said, "The "burial of the dead is, (as I apprehend,) the duty of every "parochial priest and minister; and, if he neglect or refuse "to perform the office, he may, by the express words of the "canon 86. be suspended by the ordinary for three months. "And if any temporal inconvenience arise, as a nuisance, "from the neglect of the interment of the dead corpse, he "is punishable also by the temporal courts, by indictment "or information." (*b*)

The refusal or neglect to bury dead bodies is a misdemeanor.

Provision has also been made by statute for the suitable interment of such dead bodies as may be cast on shore from the sea. The 48 Geo. III. c. 75. enacts, that the churchwardens and overseers of parishes in *England*, in which any dead body shall be found thrown in, or cast on shore from the sea, shall, upon notice of the body lying within their parishes, cause the same to be forthwith removed to some convenient place; and, with all convenient speed, to be decently interred in the church-yard or burial ground of such parishes: and if the body be thrown in, or cast on shore in any extra parochial place, where there is no churchwarden or overseer, a similar duty is imposed upon the constable or headborough of such place. (*c*)

48 Geo. III. c. 75. provides for the suitable interment of such dead bodies as may be cast on shore from the sea.

It is further enacted, that every minister, parish-clerk,

matter of great indecency; and the law of the Franks is mentioned, (as in Montesq. Sp. L. b. 30. ch. 19.) which directed, that a person who had dug a corpse out of the ground, in order to strip it, should be banished from society, and no one suffered to relieve his wants till the relations of the deceased consented to his re-admission.

(*b*) Andrews *v.* Cawthorne, Willes 537, note (*a*.) Abney, J. cited a case H. 7 G. 1. B. R. where that court made a rule upon the rector of *Daventry*, in *Northamptonshire*, to shew cause why an information should not be filed, because he neglected to bury a poor parishioner who died in that parish.

(*c*) 48 Geo. III. c. 75. s. 1.

and sexton, of the respective parishes, shall perform their duties as is customary in other funerals, and admit of such dead body being interred, without any improper loss of time; receiving such sums as in cases of burials made at the expence of the parishes. (*d*) The statute provides also as to the expences of such burials, and the raising of money to defray them; gives a reward of five shillings to the persons first giving notice to the parish officer, or the constable or headborough of an extra parochial place, of any dead body being cast on shore; and imposes a penalty of five pounds on persons finding dead bodies and not giving notice, and on parish officers neglecting to execute the act. (*e*) An appeal to the quarter sessions is also given to any person thinking himself aggrieved by any thing done in pursuance of the act. (*f*)

The preventing a dead body from being interred is also an indictable offence.

The preventing a dead body from being interred has also been considered as an indictable offence. Thus, the master of a workhouse, a surgeon, and another person, were indicted for a conspiracy to prevent the burial of a person who had died in a workhouse. (*g*) And though Hyde, C. J. upon a question how far the forbearance to sue one who fears to be sued, is a good consideration for a promise, (*h*) cited a case where a woman, who feared that the dead body of her son would be arrested for debt, was holden liable, upon a promise to pay in consideration of forbearance, though she was neither executrix nor administratrix; (*i*) yet the other judges are said to have doubted of this: (*k*) and in a recent case, Lord Ellenborough, C. J. said, it would be impossible to contend that such a forbearance could be a good con-

(*d*) 48 Geo. III. c. 75. s. 2.

(*e*) *Id.* s. 1, 3, 4, 5, 6, 7, 8, 12, 13, 14.

(*f*) *Id.* s. 10.

(*g*) Rex *v.* Young and others, cited in Rex *v.* Lynn, 2 T. R. 734.

(*h*) Quick *v.* Coppleton, 1 Vent. 161.

(*i*) The name of the case is not mentioned; but it is stated that Hyde, C. J. cited it as a case that occurred in the court of Common Pleas, when he sat there.

(*k*) Quick *v.* Coppleton, 1 Vent. 161.

sideration for an assumpsit. (*l*) Lord Ellenborough, C. J. continued, "to seize a dead body upon any such pretence "would be contra bonos mores, and an extortion upon the "relatives." And, in a subsequent part of the case, his lordship said, "As to the case cited by Hyde, C. J. of a "mother who promised to pay on forbearance of the plain- "tiff to arrest the dead body of her son, which she feared "he was about to do, it is contrary to every principle of "law and moral feeling: such an act is revolting to huma- "nity, and illegal."

The interment of the body of a person who has died a violent death before the coroner is sent for is a misdemeanor.

There is one case in which the too speedy interment of a dead body may be an indictable offence; namely, where it is the body of a person who has died of a violent death. In such case, by Holt, C. J. the coroner need not go *ex officio* to take the inquest, but ought to be sent for, and that when the body is fresh; and to bury the body before he is sent for, or without sending for him, is a misdemeanor. (*m*) It is also laid down, that if a dead body in prison, or other place, whereupon an inquest ought to be taken, be interred, or suffered to lie so long that it putrefy before the coroner has viewed it, the gaoler or township shall be amerced. (*n*)

(*l*) Jones *v.* Ashburnham, 4 East. 460.

(*m*) Reg. *v.* Clark, 1 Salk. 377. Anon. 7 Mod. 10. 2 Hawk. P. C. c. 9. s. 23. note (4.)

(*n*) 2 Hawk. P. C. c. 9. s. 23. And see an indictment against a township for a misdemeanor, in burying a body without notice to the coroner, 2 Chit. Crim. L. 256.

CHAPTER THE FORTY-FIRST.

Of going Armed in the Night-time, for the Destruction of Game.

57 Geo. III. c. 90. s. 1.—Persons found at certain times within any forest, &c. with intent to destroy, &c. game; and armed, to be deemed guilty of a misdemeanor,

A RECENT statute, 57 Geo. III. c. 90. reciting that idle and disorderly persons go frequently armed in the night-time for the purpose of protecting themselves, and aiding and abetting, and assisting each other, in the illegal destruction of game or rabbits; and that such practices were found by experience to lead to the commission of felonies and murders; for the more effectual suppression thereof, enacts, "That if any person or persons having entered into "any forest, chase, park, wood, plantation, close, or other "open or inclosed ground, with the intent illegally to de- "stroy, take, or kill, game or rabbits, or with the intent to "aid, abet, and assist, any person or persons illegally to "destroy, take, or kill, game or rabbits, shall be found at "night, that is to say, between the hours of six in the even- "ing and seven in the morning, from the first day of Octo- "ber to the first day of February; between seven in the "evening and five in the morning from the first day of Fe- "bruary to the first day of April; and between nine in the "evening and four in the morning for the remainder of the "year; armed with any gun, cross-bow, fire arms, blud- "geon, or any other offensive weapon, every such person "so offending, being thereof lawfully convicted, shall be

and may be transported for seven years, or receive other punishment.

"adjudged guilty of a misdemeanor, and shall be sentenced "to transportation for seven years, or shall receive such "other punishment as may by law be inflicted on persons "guilty of misdemeanor, and as the court before which "such offenders may be tried and convicted shall adjudge:

And offenders returning after trans-

"and if any such offender or offenders shall return into "*Great Britain* before the expiration of the term for which

" he or they shall be so transported, contrary to the intent " and meaning hereof, he or they so returning, and being " there of duly convicted, shall be adjudged guilty of felony, " and shall be sentenced to transportation for the term or " terms of his or their natural life or lives."

portation are to be transported for life.

The second section of the statute enacts, that, for the more easy and speedy bringing the offenders against this act to justice, it shall be lawful for the rangers, owners, and occupiers, of any such forest, chase, park, wood, plantation, close, or other open or inclosed ground, and also for their keepers, servants, and for any other persons, to seize and apprehend, or to assist in seizing and apprehending, offenders by virtue of this act, and to convey and deliver such offenders into the custody of a peace officer, who is hereby authorized and directed to convey them before a justice of the peace for the county or place where such offence shall be alleged to have been committed; or, in case such offenders shall not be so apprehended, any such justice may, on information before him on the oath of any credible witness or witnesses, issue his warrant for the apprehension of them; and if, upon the apprehension of any such offenders, it shall appear to such justice, on the oath of any credible witness or witnesses, that the persons so charged have been guilty of the crime of being found armed at night as aforesaid, such justice may admit them to bail, and in default of bail, commit them to the county gaol, until the next general quarter sessions of the peace, or the next general commission of gaol delivery, for the same county or place, there to be tried and dealt with as by this act is directed; and if in *Scotland*, until the persons so charged shall be dealt with as any persons charged with a transportable offence may be dealt with according to the law and practice of *Scotland*.

57 Geo. III. c. 90. s. 2.—Rangers, keepers, &c. may apprehend offenders, and deliver them to a peace officer.

And a justice of peace, on information, &c. may, in default of bail, commit till the quarter sessions, or gaol delivery:

And if in *Scotland*, until the party be dealt with according to the law of *Scotland*.

But persons *unarmed*, going out by night for the destruction of game, are not liable to such serious punishments; this statute being more mild in its enactments than one

57 Geo. III. c. 90. s. 3.—Persons found in any fores

&c. at night, with engine, &c. for destroying game, may be taken before a justice.

which was passed in the preceding year. (*a*) With respect to such persons unlawfully entering into, or being found in, any forest, &c. or other open or inclosed ground at night, (according to the former provisions of the act as to what shall be deemed night for these purposes,) having any net, engine, or other instrument, for the purpose, and with the intent to destroy, take, or kill, or who shall wilfully destroy, take, or kill game, it enacts, that the rangers, owners, and occupiers, of any such forest, &c. or other open or inclosed ground, and also their keepers, servants, and any other persons, may seize and apprehend, or assist in seizing and apprehending such offenders, and convey and deliver them into the custody of a peace officer, who is to convey such offenders before a justice of peace for the county or place where the offence shall be alleged to have been committed, to be dealt with according to law (*b*).

(*a*) The 56 Geo. III. c. 130. which is repealed by this statute, s. 4.; and by s. 5, a former statute on the same subject, 39 and 40 Geo. III. c. 50. is also repealed.

(*b*) 57 Geo. III. c. 90. s. 3. For the different modes of proceeding against such offenders, see 2 Burn. Just. tit. *Game*.

BOOK THE THIRD.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

CHAPTER THE FIRST.

Of Murder.

MURDER is the killing any person under the king's peace, with malice prepense or aforethought, either express or implied by law. (*a*) Of this description the malice prepense, *malitia precogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide; (*b*) and it will therefore be necessary to enquire concerning the cases in which such malice has been held to exist. It should, however, be observed, that when the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact has been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief. (*c*) And in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed,

Definition of the crime.—*Malitia precogitata*, or malice prepense.

(*a*) 3 Inst. 47, 51. 1 Hale 424, 448, 449. 1 Hawk. P. C. c. 31. s. 3. Kely. 127. Fost. 256. 2 Lord Raym. 1487. 4 Blac. Com. 198. 1 East. P. C. c. 5. s. 2. p. 214.

(*b*) 4 Blac. Com. 198. Gastineaux's case, 1 Leach 417.

(*c*) Fost. 256, 262.

but also, in many other cases, such killing as is accompanied with circumstances that shew the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder. (*d*)

Malice may be either express or implied.

Malice may be either *express* or *implied* by law. Express malice is, when one person kills another with a sedate deliberate mind and formed design: such formed design being evidenced by external circumstances, discovering the inward intention; as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm. (*e*) And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden: (*f*) thus where a man kills another suddenly without any, or without a considerable, provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. (*g*) So if a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. (*h*) And where one is killed in consequence of such a wilful act as shews the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief. (*i*) And it should be observed as a general rule,

(*d*) 1 Hawk. P. C. c. 31. s. 18. Fost. 257. 1 Hale 451 to 454.

(*e*) 1 Hale 451. 4 Blac. Com. 199.

(*f*) 1 East. P. C. c. 5. s. 2. p. 215.

(*g*) 4 Blac. Com. 200.

(*h*) 1 Hale 455. 4 Blac. Com. 200.

(*i*) 1 Hale 474. 1 Hawk. P. C. c. 29. s. 12. 4 Blac. Com. 200. 1 East. P. C. c. 5. s. 18. *Malitia* in its proper or legal sense is different from that sense which it bears in common speech. In common acceptation it signifies a desire of revenge, or a settled anger against a particular person: but this is not the legal sense; and Lord Holt, C. J. says upon this subject, "Some "have been led into mistakes by "not well considering what the "passion of malice is; they have "construed it to be a rancour of "mind lodged in the person kill-"ing for some considerable time "before the commission of the "fact, which is a mistake, arising "from the not well distinguish-"ing between *hatred* and *malice*. "*Envy*, *hatred*, and *malice*, are

that all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse, or justification: (*k*) and

"three distinct passions of the "mind." Kel. 127. Amongst the Romans, and in the civil law, *malitia* appears to have imported a mixture of fraud, and of that which is opposite to simplicity and honesty. Cicero speaks of it (De Nat. Deor. Lib. 3. s. 30.) as "*versuta et* "*fallax nocendi ratio*:" and in another work (De Offic. Lib. 3. s. 18.) he says, "*mihi quidem etiam veræ* "*hæreditates non honestæ videntur* "*si sint malitiosis* (i. e. according to "Pearce, a malo animo profectis) "*blanditiis officiorum: non veri-* "*tate, sed simulatione quæsitæ.*" And see Dig. Lib. 2. Tit. 13. Lex. 8. where, in speaking of a banker or cashier giving in his accounts, it is said, "*Ubi exigitur argentarius* "*rationes edere, tunc punitur cum* "*dolo malo non exhibet* * * * *Dolo* "*malo autem non edit, et qui mali-* "*tiosè edidit, et qui in totum non* "*edit.*" Amongst us malice is a term of law importing directly wickedness, and excluding a just cause or excuse. Thus Lord Coke, in his comment on the words *per malitiam*, says, "if one be appealed "of murder, and it is found by "verdict that he killed the party "*se defendendo*, this shall not be "said to be *per malitium*, because "he had a *just cause.*" 2 Inst. 384. And where the statutes speak of a prisoner on his arraignment standing *mute of malice*, the word clearly cannot be understood in its common acceptation of anger or desire of revenge against another. Thus where the statute 25 Hen. VIII. c. 3. says, that persons arraigned of petit treason, &c. standing "mute of malice or froward mind," or challenging, &c. shall be excluded from clergy, the word malice, explained by the accompanying words, seems to signify a wickedness or frowardness of mind in refusing to submit to the course of justice; in opposition to cases where some just cause may be assigned for the silence, as that it proceeds from madness, or some other disability or distemper. And in the statute 21 Edw. I. *De malefactoribus in parcis* trespassers are mentioned who shall not yield themselves to the foresters, &c. but "*immo malitiam suam prosequendo et continuando*," shall fly or stand upon their defence. And where the question of malice has arisen in cases of homicide, the matter for consideration has been (as will be seen in the course of the present and subsequent chapters) whether the act were done with or without just cause or excuse; so that it has been suggested (Chapple, J. MS. Sum.) that what is usually called malice implied by the law would perhaps be expressed more intelligibly and familiarly to the understanding if it were called *malice in a legal sense.*

(*k*) 4 Blac. Com. 201.

that it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the court and jury, unless they arise out of the evidence produced against him. (*l*) It should also be remarked that, where the defence rests upon some violent provocation, it will not avail, however grievous such provocation may have been, if it appears that there was an interval of reflection, or a reasonable time for the blood to have cooled before the deadly purpose was effected. And provocation will be no answer to proof of *express* malice; so that if, upon a provocation received, one party deliberately and advisedly denounce vengeance against the other, as by declaring *that he will have his blood*, or the like, and afterwards carry his design into execution, he will be guilty of murder; although the death happened so recently after the provocation as that the law might, apart from such evidence of express malice, have imputed the act to unadvised passion. (*m*) But where fresh provocation intervenes between preconceived malice and the death, it ought clearly to appear that the killing was upon the antecedent malice; for if there be an old quarrel between A. and B. and they are reconciled again, and then, upon a new and sudden falling out, A. kills B., this is not murder. (*n*) It is not to be presumed that the parties fought upon the old grudge, unless it appear from the whole circumstances of the fact; (*o*) but if upon the circumstances it should appear that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then such killing will be murder. (*p*)

The party killing.

The person committing the crime must be a free agent, and not subject to actual force at the time the fact is done: thus if A. by force take the arm of B. in which is a weapon, and therewith kill C., A. is guilty of murder, but not B. But if it be only a moral force put upon B. as by threaten-

(*l*) Fost. 255. 4 Blac. Com. 201. 1 East. P. C. c. 5. s. 12. p. 224.

(*m*) 1 East. P. C. c. 5. s. 12. p. 224.

(*n*) 1 Hale 151.

(*o*) 1 Hawk. P. C. c. 31. s. 30.

(*p*) 1 Hale 451.

ing him with duress or imprisonment, or even by an assault to the peril of his life, in order to compel him to kill C., it is no legal excuse. (*q*) If, however, A. procures B. an ideot, or lunatic, to kill C., A. is guilty of the murder as principal, and B. is merely an instrument. (*r*) So if A. lay a trap or pitfall for B. whereby B. is killed, A. is guilty of the murder as a principal in the first degree, the trap or pitfall being only the instruments of death. (*s*) If one persuade another to kill himself, the adviser is guilty of murder; and if the party takes poison himself by the persuasion of another, in the absence of the persuader, yet it is a killing by the persuader; and he is principal in it, though absent at the taking of the poison. (*t*) And he who kills another upon his desire or command is, in the judgment of the law, as much a murderer as if he had done it merely of his own head. (*u*)

The party killed.

Murder may be committed upon any person within the king's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, (*w*) or to kill a Jew, an outlaw, one attainted of felony, or one in a præmunire, (*x*) is as much murder as to kill the most regular born Englishman. (*y*)

Children in the mother's womb.

An infant in its mother's womb not being *in rerum naturâ*, is not considered as a person who can be killed within the description of murder; and therefore if a woman, being quick or great with child, take any potion to cause an abortion, or if another give her any such potion, or if a person strike her, whereby the child within her is killed, it is not

(*q*) 1 Hale 433. Dalt. cap. 145. p. 473. 1 East. P. C. c. 5. s. 12. p. 225.

(*r*) 1 East. P. C. c. 5. s. 14. p. 228. 1 Hawk. P. C. c. 31. s. 7.

(*s*) 4 Blac. Com. 35.

(*t*) 1 Hale 431. Vaux's case, 4 Rep. 44, b.

(*u*) 1 Hawk. P. C. c. 27. s. 6. Sawyer's case, Old Bailey, May 1815, MS. S. P.

(*w*) 1 Hale 433.

(*x*) *Id. Ibid.* Formerly to kill one attaint in a præmunire was held not homicide, 24 Hen. VIII. B. Coron. 197. but the stat. 5 Eliz. c. 1. has declared it to be unlawful.

(*y*) 4 Blac. Com. 198.

murder or manslaughter.(z) But by a recent statute any person wilfully and maliciously administering poison, to cause or procure the miscarriage of any woman, then being quick with child, is guilty of a capital offence: and any person administering medicines to women not quick with child, with intent to procure miscarriage, is guilty of felony.(a) Where a child, having been born alive, afterwards died by reason of any potions or bruises it received in the womb, it seems always to have been the better opinion that it was murder in such as administered or gave them.(b)

Bastard children.

The murder of *bastard children* by the mother was considered as a crime so difficult to be proved, that a special legislative provision was made for its detection by the statute 21 Jac. I. c. 27. which required that any such mother endeavouring to conceal the death of the child, should prove, by one witness at least, that the child was actually born dead. But this law, which made the concealment of the death almost conclusive evidence of the child's being murdered by the mother, was accounted to savour strongly of severity, and always construed most favourably for the unfortunate object of accusation; and at length it was repealed, together with an Irish act upon the same subject, by a late statute (c), which provides "that the trials in England and "Ireland respectively, of women charged with the murder

(z) 1 Hale 433.

(a) 43 Geo. III. c. 58.

(b) 3 Inst. 50. 1 Hawk. P. C. c. 31. s. 16. 4 Blac. Com. 198. 1 East. P. C. c. 5. s. 14. p. 228. *contrà* 1 Hale 432. and Staundf. 21. but the reason on which the opinions of the two last writers seem to be founded, namely, the difficulty of ascertaining the fact, cannot be considered as satisfactory, unless it be supposed that such fact never can be clearly established.

(c) 43 Geo. III. c. 58. s. 3. The Irish act was one of the 6 Ann. The 49 Geo. III. c. 14. repeals an act of the parliament of *Scotland*, sess. 2. parl. 1. Guil. and Mar. by which a woman concealing her being with child during the whole space, and not calling for and making use of assistance in the birth, was to be reputed the murderer of the child, if it was found dead or missing.

" of any issue of their bodies, male or female, which being " born alive would by law be bastard, shall proceed and be " governed by such and the like rules of evidence, and of " presumption, as are by law used and allowed to take " place in respect to other trials for murder, and as if the " said two several acts had never been made (*d*).

Of the means of killing.

The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome (*e*). But there must be some external violence, or *corporal* damage, to the party; and therefore where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice. (*f*) If a man however does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended: (*g*) as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died; (*h*) or where a harlot, being delivered of a child, left it in an orchard covered only with leaves, in which condition it was killed by a kite; (*i*) or where a child was placed in a hogstye, where it was devoured. (*k*) In these cases, and also where a child was shifted by parish officers from parish to parish, till it

(*d*) The statute further provides, that the jury, if they acquit the prisoner of murder, may find that she was delivered of a bastard child, and endeavoured to conceal the birth, whereupon the court may adjudge her to be committed, for any time not exceeding two years. See *post*, S. 6. of this Chapter.

(*e*) 4 Blac. Com. 196. *moriendi mille figuræ.* 1 Hale 431. 1 Hawk. P. C. c. 31. s. 4.

(*f*) 1 Hale 427. 429. 1 East. P. C. c. 5. s. 13. p. 225.

(*g*) 4 Blac. Com. 197.

(*h*) 1 Hawk. P. C. c. 31. s. 5. 1 Hale 431, 432.

(*i*) 1 Hale 431. 1 Hawk. P. C. c. 31. s. 6.

(*k*) 1 East. P. C. c. 5. s. 13. p. 226.

'died for want of care and sustenance, (*l*) it was considered that the acts so done, wilfully and deliberately, were of malice prepense.

By negligence and harsh usage towards an apprentice.

Upon the same principles, where there is found to be actual malice, or a wilful disposition to injure another, or an obstinate perseverance in doing an act necessarily attended with danger, without regard to the consequences, as if a master by premeditated negligence, or harsh usage, cause the death of his apprentice, it will be murder. Thus, where the prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; not having suffered him to be in a bed on account of the vermin, but having made him lie on the boards for some time without covering, and without common medical care; and the death of the apprentice, in the opinion of the medical persons who were examined, was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and the medical persons inclined to think that, if he had been properly treated when he came home, he might have recovered; the court under these circumstances, and others in favour of the prisoner, left it to the jury to consider, whether the death of the apprentice was occasioned by the ill treatment he received from his master after returning from Bridewell, and whether that ill treatment amounted to evidence of malice; in which case they were to find him guilty of murder. (*m*) And in a more modern case a prisoner was found guilty of murder in causing the death of his apprentice, by not providing him with sufficient food and nourishment. The prisoner Charles Squire, and his wife, were both indicted for the murder of a boy who was bound as a parish apprentice to the prisoner

(*l*) Palm. 545.

(*m*) Self's case, 1 East. P. C. c. 5. s. 13. p. 226, 7. 1 Leach 137. and see the case more fully stated in the Chapter on *Manslaughter*.

Charles; and it appeared upon the trial that both the prisoners had used the apprentice in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that in his judgment the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c. which he had received. Lawrence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. (*n*)

By perjury.

By the ancient common law, a species of killing was held to be murder, concerning which much doubt has been entertained in more modern times, namely, the bearing false witness against another with an express premeditated design to take away his life, so as the innocent person be con-

(*n*) Squire and his wife (case of) *Stafford* Lent Assizes, 1799, MS.; and as to the principles upon which the wife was acquitted, see the case more fully stated, *ante*, 24, 25. After the surgeon had deposed that the boy died from debility, and for want of proper food and nourishment, and not from the wounds, &c. which he had received, the learned judge was proceeding to enquire of him, whether, in his judgment, the series of cruel usage the boy had received, and in which the wife had been as active as her husband, might not have so far broken his constitution as to promote the debility, and co-operate along with the want of proper food and nourishment to bring on his death, when the surgeon was seized with a fainting fit, and, being taken out of court, did not recover sufficiently to attend again upon the trial. The judge, after observing, that upon the evidence, as it then stood, he could not leave it to the jury to consider, whether the wounds, &c. inflicted on the boy, had contributed to cause his death, said, that if any physician or surgeon were present who had heard the trial, he might be examined as to the point intended to be enquired into; but no such person being present, he delivered his opinion to the jury, as stated in the text.

demned and executed. (*o*) But a very long period has elapsed since this offence has been holden to be murder; and in the last instance of a prosecution for it, the prisoners having been convicted, judgment was respited, in order that the point of law might be more fully considered upon a motion in arrest of judgment. (*p*) The then attorney general, however, declining to argue the point, the prisoners were discharged of that indictment; but it should seem that there are good grounds for supposing that the attorney general declined to argue this point from prudential reasons, and principally lest witnesses might be deterred from giving evidence upon capital prosecutions if it must be at the peril of their own lives, but not from any apprehension that the point of law was not maintainable. (*q*) *In foro conscientiæ* this offence is, beyond doubt, of the deepest malignity.

By savage animals.

If a man has a *beast* that is used to do mischief, and he, knowing it, suffers it to go abroad, and it kills a man, this has been considered by some as manslaughter in the owner; (*r*) and it is agreed by all that such a person is guilty of a very gross misdemeanour: (*s*) and if a man purposely turn such an animal loose, knowing its nature, it is

(*o*) Mirror, c. 1. s. 9. Brit. c. 52. Bract. lib. 3. c. 4. 1 Hawk. P. C. c. 31. s. 7. 3 Inst. 91. 4 Blac. Com. 196.

(*p*) Macdaniel, Berry, and Jones (case of), Fost. 132. 1 Leach 44. This trial took place in 1756. The prisoners were indicted for murder upon a conspiracy of the kind mentioned in the text against one Kidden, who had been convicted and executed for a robbery upon the highway, upon the evidence of Berry and Jones.

(*q*) 4 Blac. Com. 196. note (*g*), where Mr. J. Blackstone says, that he had good grounds for such an opinion, and that nothing should be concluded from the waiving of that prosecution; and in 1 East. P. C. c. 5. s. 94. p. 333. note (*a*), the author states that he had heard Lord Mansfield, C. J. make the same observation, and say, that the opinions of several of the judges at that time, and his own, were strongly in support of the indictment.

(*r*) 4 Blac. Com. 197.

(*s*) 1 Hawk. P. C. c. 31. s. 8.

with us (as in the Jewish law) (*t*) as much murder, as if he had incited a bear or a dog to worry people; and this, though he did it barely to frighten them, and make what is called sport. (*u*)

By medicines.

If a physician or surgeon give his patient a potion or plaister to cure him, and, contrary to the expectation of such physician or surgeon, it kills him, this is neither murder nor manslaughter, but misadventure. (*w*) It has however been holden, that if the medicine were administered, or the operation performed, by a person not being a *regular* physician or surgeon, the killing would be manslaughter at the least; (*x*) but the law of this determination has been questioned by very high authority, upon the ground that physic and salves were in use before licensed physicians and surgeons existed. (*y*)

By infection;

A question is put by Lord Hale, whether if a person infected with the plague should go abroad with the intention of infecting another, and another should thereby be infected and die, this would not be murder: but it is admitted that, if no such intention should evidently appear, it would not be felony, though a great misdemeanour. (*z*) It may be observed, that an offence of this sort in breach of quarantine is made felony without clergy by a recent statute. (*a*)

By rape.

A question has been raised, whether an indictment for murder could be maintained for killing a female infant by *ravishing* her; but the point was not decided. (*b*)

(*t*) Exod. c. xxi. v. 29.

(*u*) 4 Blac. Com. 197. and see 1 Hale, 430. where the author says, that he had heard that it had been ruled to be murder, at the Assizes held at *St. Albans*, for *Hertfordshire*, and the owner hanged for it; but that it was but an hearsay.

(*w*) 4 Blac. Com. 197. 1 Hale, 429.

(*x*) Brit. c. 5. 4 Inst. 251.

(*y*) 1 Hale, 429.

(*z*) 1 Hale, 432.

(*a*) 45 Geo. III. c. 10. *ante*, 149, *et sequ.*

(*b*) Ladd's case, 1 Leach 96. 1 East. P. C. 226. The judges to

Time of death.

It is agreed that no person shall be adjudged by any act whatever to kill another, who does not die thereof within a year and a day after the stroke received, or cause of death administered, in the computation of which the whole day upon which the hurt was done is to be reckoned the first. (*c*)

Treatment of wounds.

Questions may occasionally arise as to the *treatment* of the wound or hurt received by the party killed. Upon this subject it has been ruled, that if a man give another a stroke not in itself so mortal but that with good care he might be cured, yet if the party die of this wound within the year and day, it is murder, or other species of homicide, as the case may be: though if the wound or hurt be not mortal, and it shall be made clearly and certainly to appear that the death of the party was caused by ill applications by himself or those about him, of unwholesome salves or medicines, and not by the wound or hurt, it seems that this is no species of homicide. But when a wound not in itself mortal, for want of proper applications, or from neglect, turns to a gangrene or a fever, and that gangrene or fever is the immediate cause of the death of the party wounded, the party by whom the wound is given is guilty of murder, or manslaughter, according to the circumstances. For though the fever or gangrene, and not the wound, be the immediate cause of the death, yet the wound being the cause of the gangrene or fever, is the mediate cause of the death, *causa causati*. (*d*)

Killing a person labouring under disease.

If a man be sick of some disease, which, by the course of nature, might possibly end his life in half a year, and another gives him a wound or hurt which hastens his death by irritating and provoking the disease to operate more violently

whom the case was referred gave no opinion upon the point, as the indictment was holden to be defective, in not having stated that the prisoner gave the deceased a mortal wound.

(*c*) 1 Hawk. P. C. c. 31. s. 9. 4 Blac. Com. 197. 1 East. P. C. c. 5. 112. p. 343, 344.

(*d*) 1 Hale, 428.

or speedily, this is murder or other homicide, according to the circumstances, in the party by whom such wound or hurt was given. For the person wounded does not die simply *ex visitatione Dei*, but his death is hastened by the hurt which he received, and it shall not be permitted to the offender to apportion his own wrong. (*e*)

Gross cases of murder: poisoning.

It will not be necessary to specify the particular instances of the more gross kinds of wilful murder in which the malignity of the heart, the malice prepense which has been already described, is apparent. It may, however, be remarked, that of all species of deaths, that by poison has been considered as the most detestable, because it can, of all others, be least prevented by manhood or forethought. It is a deliberate act, necessarily implying malice, however great the provocation may have been; (*f*) and on account of its singular enormity was made treason by the statute 22 Hen. VIII. c. 9. and punishable by a lingering kind of death; but this statute was repealed by stat. 1 Edw. 6. c. 12. ss. 10. and 13. which again makes the offence wilful murder, and takes away clergy. (*g*) By a late statute, (*h*) administering poison with *intent* to murder; though no death should ensue, is made a capital offence, which will be more particularly mentioned in its proper place. (*i*)

(*e*) 1 Hale 428. Lord Hale says, that thus he had heard that learned and wise judge, Justice Rolle, frequently direct.

(*f*) 1 East. P. C. c. 5. s. 12. p. 225. s. 30. p. 251. 4 Bl. Com. 200. 1 Hale 455.

(*g*) The true grounds of this statute of Edw. VI. have been much discussed, and different opinions have been expressed on the subject by many great lawyers. See the opinions of *Lord Coke*, 11 Co. 32. a. *Kelyng*, C. J. Kel. 32. *Lord Holt*, Kel. 125. and *Mr. Just. Foster*, Fost. 68, 69. Mr. Justice Foster considered the enactments of the statute to be not in affirmance of the common law, but by way of *revival* of it; to this solution of the difficulty Mr. *Barrington* has made some objections (Obs. on the stat. 524.) which have been observed upon by the editor of Mr. Just. Foster's work, in his preface to the second edition.

(*h*) 43 Geo. III. c. 58. s. 1.

(*i*) *Post*, Chap. X.

Felo de se.

Self-murder may be mentioned as a peculiar instance of malice directed to the destruction of a man's own life, by inducing him deliberately to put an end to his existence, or to commit some unlawful malicious act, the consequence of which is his own death. (*k*) It has been already stated, that a person killing another, upon his desire or command, is guilty of murder; (*l*) but in this case the person killed is not looked upon as a *felo de se*, inasmuch as his assent, being against the laws of God and man, was void: (*m*) but where two persons agree to die together, and one of them, at the persuasion of the other, buys poison and mixes it in a potion, and both drink of it, and he who bought and made the potion survives by using proper remedies, and the other dies; it is said to be the better opinion, that he who dies shall be adjudged a *felo de se*, because all that happened was originally owing to his own wicked purpose, and the other only put it in his power to execute it in that particular manner. (*n*) Upon a principle which will presently be mentioned more fully, if a man, attempting to kill another, miss his blow and kill himself, (*o*) or intending to shoot at another, mortally wound himself by the bursting of the gun, (*p*) he is *felo de se;* his own death being the consequence of an unlawful malicious act towards another. It has also been said, that if A. strike B. to the ground, and B. draw a knife and hold it up for his own defence, and A. in haste falling upon B. to kill him, fall upon the knife and be thereby killed, A. is *felo de se;* (*q*) but this has been doubted. (*r*)

(*k*) 4 Bl. Com. 189.

(*l*) *Ante*, 617.

(*m*) 1 Hawk. P. C. c. 27. s. 6.

(*n*) *Id. Ibid.* Keilw. 136. Moor, 751.

(*o*) 1 Hale 412.

(*p*) 1 Hawk. P. C. c. 27. s. 4.

(*q*) 3 Inst. 54. Dalt. c. 144.

(*r*) See 1 Hale 412. who considers, that in this case B. is not guilty at all of the death of A., not even *se defendendo*, as he did not strike, only held up the knife; and that A. is not a *felo de se*; but that it is homicide by misadventure. In Hawk. P. C. c. 27. s. 5. it seems to be considered that B. should be adjudged to kill A. *se defendendo*.

Of aiders and abettors. How far an abettor must be *present* at the commission of the crime.

In order to make an abettor to a murder or manslaughter principal in the felony, he must be present aiding and abetting the fact committed. The *presence*, however, need not always be an actual standing by within sight or hearing of the fact; for there may be a constructive presence, as when one commits a murder and another keeps watch or guard at some convenient distance. (*s*) But a person may be present, and, if not aiding and abetting, be neither principal nor accessary: as, if A. happen to be present at a murder and take no part in it, nor endeavour to prevent it, or to apprehend the murderer, this strange behaviour, though highly criminal, will not of itself render him either principal or accessary. (*t*)

Persons present may be guilty of different degrees of homicide.

If several persons are present at the death of a man, they may be guilty of different degrees of homicide, as one of murder and another of manslaughter: for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. (*u*) And it has been decided, that if the person charged as principal be acquitted, a conviction of another charged in the indictment as present, aiding and abetting him in the murder, is good: for (by Holt, C. J.) "though "the indictment be against the prisoner for aiding, assisting, and abetting A. who was acquitted, yet the indictment and trial of this prisoner is well enough: for all are "principals, and it is not material who actually did the "murder." (*w*) And though anciently the person who gave the fatal stroke was considered as the principal, and

(*s*) 1 Hale 615. Fost. 350. 4 Blac. Com. 34. See *ante*, 30.

(*t*) Fost. 350. 1 Hale 439.

(*u*) 1 East. P. C. c. 5. s. 121. p. 350.

(*w*) Wallis and others, (case of) Salk. 334. This point was doubted of by some of the judges in Taylor and Shaw's case, 1 Leach 360. 1 East. P. C. c. 5 s. 121. p. 351. but a majority of them thought the conviction proper. No express determination, however, was made in the last case, as it was thought by the judge who tried the prisoner a proper case for a pardon on the special circumstances.

those that were present aiding and assisting only as accessories; yet it has long been settled, that all that are present aiding and assisting are equally principals with him who gave the stroke whereof the party died, though they are called principals in the second degree. (*x*) So that if A. be indicted for murder, or manslaughter, and C. and D. for being present, aiding and assisting A., and A. appears not, but B. and C. appear, they shall be arraigned; and if convicted shall receive judgment, though A. neither appear nor be outlawed. (*y*) And if A. be indicted as having given the mortal stroke, and B. and C. as present, aiding and assisting, and upon the evidence it appears that B. gave the stroke, and A. and C. were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all; for it is only a circumstantial variance, and in law it is the stroke of all that were present aiding and abetting. (*z*)

Of accessories before the fact.

He that counsels, commands, or directs, the killing of any person, and is himself absent at the time of the fact being done, is an accessory to murder before the fact. (*a*) And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact: so that if A. bid his servant hire somebody, no matter whom, to murder B., and furnish him with money for that purpose, and the servant procure C., a person whom A. never saw or heard of, to do it, A. is an accessory before the fact. (*b*)

If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal, and A. is accessory in the murder. And this holds, even though the party killed be not in *rerum naturâ* at the time of the advice given:

(*x*) 1 Hale 437. 4 Plowd. Com. 100. a.

(*y*) 1 Hale 437. Plowd. Com. 97, 100. Gythin's case.

(*z*) 1 Hale 438. Plowd. Com. 98, a. 9 Co. 67, b. Mackally's case, 1 East. P. C. c. 5. s. 121. p. 350.

(*a*) 1 Hale 435.

(*b*) Fost. 125.

so that if a man advise a woman to kill her child as soon as it shall be born, and she kills it when born in pursuance of such advice, he is an accessory to the murder. (*c*)

Cases where the crime is the direct and immediate effect of the command or counsel of the accessory.

It is a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessary to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory; the crime having been committed in the execution of a command which naturally tended to endanger the life of another. (*d*) And *à fortiori*, therefore, if a man command another to rob any person, and he in robbing him kill him, the person giving such command is as much an accessory to the murder, as to the robbery which was directly commanded: and it is also said, that if one command a man to rob another, and he kill him in the attempt but do not rob him, the person giving such command is guilty of the murder, because it was the direct and immediate effect of an act done in execution of a command to commit a felony. (*e*)

Cases where the crime is not the direct and immediate effect of the command or counsel of the person charged as accessory.

But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. Thus, if A. persuade B. to poison C., and B. accordingly give poison to C., who eats part of it, and gives the rest to D., who is killed by it, A. is guilty of a great misdemeanour only in respect of D., but is not an accessory to his murder; because it was not the direct and immediate effect of the act done in pursuance of the command. (*f*) And if A. counsel or command B. to beat C. with a small wand or rod, which would not in all

(*c*) 1 Hale 617. 2 Hawk. P. C. c. 29. s. 18. 4 Blac. Com. 37. Dy. 185.

(*d*) 1 Hale 435. 2 Hawk. P. C. c. 29. s. 18. 4 Blac. Com. 37.

(*e*) 2 Hawk. P. C. c. 29. s. 18.

(*f*) *Id. Ibid.*

human reason cause death, and B. beat C. with a great club, or wound him with a sword, whereof he dies, it seems that A. is not accessary; because there was no command of death, nor of any thing that could probably cause death; and B. departed from the command in substance, and not in circumstance. (*g*) But if the crime committed be the same in substance with that which was commanded, and vary only in some circumstantial matters; as where a man advises another to kill a person in the night, and he kills him in the day; or to kill him in the fields, and he kills him in the town; or to poison him, and he stabs or shoots him; the person giving such command is still accessary to the murder: for the substance of the thing commanded was the death of the party killed, and the manner of its execution is a mere collateral circumstance. (*h*)

Of accessories after the fact.

An accessory *after the fact*, in murder, as in any other felony, may be where a person, knowing a murder to have been committed, receives, relieves, comforts, or assists the offender; as to which kind of accessory some points are noticed in a former chapter. (*i*) It may be here observed, however, that if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make such person accessary to the homicide; for till death ensues there is no felony committed. (*j*)

Clergy.

Clergy is taken away in all cases of murder and petit treason from accessories before, as well as principals, and lands and goods are forfeited; the forfeiture in such case relating back to the stroke or other cause of death; (*k*) but accessories after the fact, either in petit treason or murder, are in no instance ousted of clergy. (*l*)

(*g*) 1 Hale 436.

(*h*) 2 Hawk. P. C. c. 29. s. 20. 4 Blac. Com. 37.

(*i*) *Ante*, 48, 49.

(*j*) 4 Blac. Com. 38. 2 Hawk. P. C. c. 29. s. 35.

(*k*) Fost. 304, *et sequ.* 1 Hale 426. 1 East. P. C. 215.

(*l*) 2 Hale 342, 4. 1 East. P. C. c. 5. s. 3. p. 218. In 1 Hawk. P. C.

It has been before submitted, that a statement of the several instances of gross and direct wilful murder cannot be thought necessary. But there are a variety of cases of a less decided character, and some upon which doubts have arisen, which may properly be here considered. An apt arrangement of them is a matter of some difficulty; but the following order seems to be appropriate: I. Cases of provocation. II. Cases of mutual combat. III. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace. IV. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act. V. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

SECTION I.

CASES OF PROVOCATION.

As the indulgence which is shewn by the law in some cases to the first transport of passion is a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason; so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed. (*m*) All the circumstances of the case must lead to the conclusion, that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and

c. 32. s. 11. it is said, that accessories, both before and after, in petit treason, are debarred of clergy by 4 and 5 Phil. and Mary, c. 4. But *quære*, whether that statute applies to accessories *after* the fact.

(*m*) Fost. 315.

previous malignity of heart, but solely imputable to human infirmity. (*n*) For there are many trivial, and some considerable, provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.

Words, gestures, &c.

No *breach* of a man's *word or promise;* no *trespass*, either to lands or goods; no affront by bare *words* or *gestures*, however false and malicious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. (*o*) And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to do some great bodily harm. (*p*)

A. passing by the shop of B. distorted his mouth, and smiled at him, and B. killed him: this was held murder; for it was no such provocation as would abate the presumption of malice in the party killing. (*q*)

If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) take the wall of him, and thereupon A. kill B., this is murder; but if B. had justled A., this justling had been a provocation, and would have made it manslaughter. (*r*)

If there be a chiding between husband and wife, and the husband strike his wife thereupon with a pestle, so that she dies presently, it is murder; and the chiding will not be a provocation to extenuate it to manslaughter. (*s*)

(*n*) 1 East. P. C. c. 5. s. 19. p. 232.

(*o*) Post. 290. 1 Hawk. P. C. c. 31 s. 33. 1 Hale 455.

(*p*) Post. 290, 291.

(*q*) Brain's case, Hale 455. Cro. Eliz. 778. Kel. 131.

(*r*) 1 Hale, 455. But this case probably supposes considerable violence and insult in the justling.

(*s*) Crompt. *fol.* 120, a. See also Kel. 64. 1 Hale 456.

A woman called a man, who was sitting drinking in an alehouse, "*a son of a whore*," upon which the man took up a broomstaff, and at a distance threw it at her and killed her; and it was propounded to the judges whether this was murder or manslaughter. Two questions were made, 1. Whether bare words, or words of this nature, would amount to such a provocation as would extenuate the fact into manslaughter. 2. Admitting that they would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword or shooting with a pistol; yet whether this striking, so improbable to cause death, would not alter the case. The judges were not unanimous upon this case; and, as the consequence of a resolution on either side was great, it was advised that the king should be moved to pardon the offender; which was accordingly done. (*t*)

In a case where it was decided that if A. give slighting words to B., and B. thereupon immediately kill him, such killing would be murder in B., it is also stated to have been holden, that words of *menace* or *bodily harm* would amount to such a provocation as would reduce the offence of killing to manslaughter. (*u*) But it should be observed, that in another report of the same case this latter position is not to be found. (*w*) And it seems that such words ought at least to be accompanied by some act, denoting an immediate intention of following them up by an actual assault. (*x*)

Assault.

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the

(*t*) 1 Hale 455, 456.

(*u*) Lord Morley's case, 1 Hale 455.

(*w*) Kel. 55.

(*x*) 1 East. P. C. c. 5. s. 20. p. 233.

crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow. Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty: and barbarity will often make malice. (*y*)

Stedman's case.

There being an affray in the street, one Stedman, a foot soldier, ran hastily towards the combatants. A woman, seeing him run in that manner, cried out, "You will not murder the man, will you?" Stedman replied, "What is that to you, you bitch?" The woman thereupon gave him a box on the ear, and Stedman struck her on the breast with the pommel of his sword. The woman then fled; and Stedman pursuing her, stabbed her in the back. It seemed to Holt, C. J. that this was *murder, a single box on the ear from a woman not being a sufficient provocation to kill in such a manner*, after Stedman had given her a blow in return for the box on the ear; and it was proposed to have the matter found specially: but it afterwards appearing, in the progress of the trial, that the woman struck the soldier in the face with an iron patten, and drew a great deal of blood, it was holden clearly to be no more than manslaughter. (*z*) The smart of the man's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact. (*a*)

Tranter and Reason's case.

The following case is reported. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about *civility money*, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the

(*y*) Per Lord Holt in Keate's case, Comb. 408.

(*z*) Stedman's case, Fost. 292.

MSS. Tracy and Denton 57. 1 East. P. C. c. 5. s. 21. p. 234.

(*a*) Fost. 292.

debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom; which, at the importunity of his servant, he laid down upon the table, saying, "He did not intend to hurt the officers, but he would not be ill used." The officer, who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: one stabbed him in nine places, he all the while on the ground, begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death wound. And this is reported to have been holden manslaughter *by reason of the first assault with the cane.* (*b*) "This (says Mr. Justice Foster) is the case as reported by "*Sir John Strange;* and an extraordinary case it is; that "all these circumstances of aggravation, two to one, he "helpless and on the ground, begging for mercy, stabbed "in nine places, and then dispatched with a pistol; that all "these circumstances, plain indications of a deadly revenge "or diabolical fury, should not outweigh a slight stroke "with a cane." (*c*)

Personal restraint and coercion.

As an assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, where the revenge is disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation. Two soldiers came at eleven o'clock at night to a publican's, and demanded beer, which he refused, alleging the unseasonableness of the hour, and advised

(*b*) Tranter and Reason (case of) 1 Stra. 499.

(*c*) Fost. 293. where Mr. J. Foster states many circumstances of the case which the reporter had omitted, and also the direction to the jury, in which the chief justice, upon other grounds than the first assault with the cane, told them it could be no more than manslaughter. See this case more fully stated *post*, Chap. *On Manslaughter*.

them to go to their quarters; whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company, who had been detained there on business, one of them rushed in, the other remaining without, and renewed his demand for beer; to which the landlord returned the same answer: and on his refusing to depart, and persisting to have some beer, and offering to lay hold of the landlord, the latter at the same instant collared him; the one pushing and the other pulling each other towards the outer door; where when the landlord came he received a violent blow on the head with some sharp instrument from the other soldier, who had remained without, which occasioned his death a few days afterwards. Buller, J. held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them. For the landlord did no more in attempting to put the soldier out of his house at that time of the night, and after the warning he had given him, than he lawfully might; which was no provocation for the cruel revenge taken: more especially as there was reasonable evidence of the prisoners having come the second time with a deliberate intention to use personal violence, in case their demand for beer was not complied with. (*d*)

Provocation of a slighter kind—mode of resentment—and nature of the instruments used.

In cases of provocation of a slighter kind, not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal, did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement.(*e*) For if on any sudden provocation of a slight nature one person beat another

(*d*) Willoughby and another (case of), *Bodmin* Sum. Ass. 1791. MS. 1 East. P. C. c. 5. s. 56. p. 288.

(*e*) 1 East. P. C. c. 5. s. 22. p. 235. and s. 23. p. 238. 9.

in a cruel and unusual manner, so that he dies, it is murder by express malice; though the person so beating the other did not intend to kill him. (*f*)

Thus the case which has been before mentioned where, upon a chiding between husband and wife, the husband struck his wife with a pestle, (*g*) proceeded upon the ground of the pestle being an instrument likely to endanger life (*h*). And it is probable that the doubt which was felt by some of the judges in the case where a man, upon being called by a woman a son of a whore, took up a broom staff and threw it at her, and killed her, (*i*) arose from the consideration that the instrument was not such as was likely, when thrown from the given distance, to have occasioned death, or great bodily harm. (*k*)

The nature of the *instrument used* has been much considered in the following case. The prisoner's son fought with another boy, and was beaten; he ran home to his father all bloody; who presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died. (*l*) This was ruled manslaughter, because done in sudden heat and passion: but upon this case Mr. Justice Foster makes the following remarks. (*m*) "Surely "the provocation was not very grievous. The boy had "fought with one who happened to be an over-match for "him, and was worsted; a disaster slight enough, and very "frequent among boys. If upon this provocation the "father, after running three quarters of a mile, had set Rowley's case.

(*f*) 4 Blac. Com. 199.

(*g*) *Ante*, 632.

(*h*) 1 East. P. C. c. 5. s. 22. p. 235.

(*i*) *Ante*, 633.

(*k*) 1 East. P. C. c. 5. s. 22. p. 236.

(*l*) Rowley's case, 12 Rep. 87. S. C. 1 Hale 453. in which report the words are, "and strikes C. that he dies." Mr. Justice Foster, in citing the case, says, that the father, after running three quarters of a mile, beats the other boy, "who dieth of this beating." Fost. 294.

(*m*) Fost. 294.

" his strength against the child, had dispatched him with a " hedge stake, or any other deadly weapon, or by repeated " blows with his cudgel, it must, in my opinion, have been " murder; since any of these circumstances would have " been a plain indication of malice: but with regard to these " circumstances, with what weapon or to what degree the " child was beaten, *Coke* is totally silent. But Croke (*n*) " setteth the case in a much clearer light, and at the same " time leadeth his readers into the true grounds of the judg- " ment. His words are, ' Rowly struck the child with *a* " *small cudgel*, of which stroke he *afterwards* died.' I think " it may be fairly collected from *Croke's* manner of speak- " ing, and *Godbolt's* report, (*o*) that the accident happened " *by a single stroke with a cudgel not likely to destroy*, and " that death did not immediately ensue. The stroke was " given in heat of blood, and not with any of the circum- " stances which import malice, and therefore manslaughter. " I observe, that Lord Raymond layeth great stress on this " circumstance: *that the stroke was with a cudgel not likely* " *to kill.*" (*p*)

Hazel's case.

In a case where upon a special verdict it was found that the prisoner, having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skains knotted, threw at the child *a four-legged stool*, which struck her on the right side of the head on the temple, and caused her death soon after the blow so given; and it was also found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner did not intend, at the time she threw the stool, to kill the child; the matter was considered as of great difficulty, and no opinion was ever delivered by the judges. (*q*) The doubt appears to have been principally upon the question, whether the instru-

(*n*) Cro. Jac. 296.

(*o*) Godb. 182. It is there said to have been "a rod," meaning probably a small wand.

(*p*) 2 Lord Raym. 1498. *Ante*, note (*l*)

(*q*) Hazel's case, 1 Leach 368.

ment was such as would probably, at the given distance, have occasioned death or great bodily harm. (*r*)

Where A. finding a trespasser upon his land, in the first transport of his passion, beat him and killed him, and it was holden to be manslaughter, (*s*) it must be understood that he beat the trespasser not with a mischievous intention, but *merely to chastise* him, and to deter him from a future commission of such a trespass. For if A. had knocked his brains out with a bill or hedge stake, or had killed him by an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, it would have been murder; these circumstances being some of the genuine symptoms of the *mala mens*, the heart bent upon mischief, which enter into the true notion of malice in the legal sense of the word. (*t*)

Result of the cases upon this subject.

It seems, therefore, that it may be laid down that, *in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, that the party intended to kill, or to do some great bodily harm, such homicide will be murder.* Accordingly, where a parker, finding a boy stealing wood in his master's ground, bound him to his horse's tail and beat him, and the horse taking fright, and running away, the boy was dragged on the ground till his shoulder was broken, whereof he died; it was ruled murder: for it was not only an illegal, but a deliberate and dangerous act; the correction was excessive, and savoured of cruelty. (*u*)

Provocation no defence where express malice.

It should be further remembered, upon the grounds which have been before mentioned, (*w*) that the plea of provocation will not avail where there is evidence of *express malice.*

(*r*) 1 East. P. C. c. 5. s. 22. p. 236.

(*s*) 1 Hale 473.

(*t*) Fost. 291.

(*u*) Halloway's case, Cro. Car. 131. Palm. 545. 1 Hawk. P. C. c. 39. s. 42. W. Jones 198. 1 Hale 453. Kel. 127. 1 East. P. C. c. 5. s. 22. p. 237.

(*w*) *Ante*, 616.

In such case not even previous blows or struggling will extenuate homicide.

Mason's case. Deliberate and express malice.

Richard Mason was indicted for the wilful murder of William Mason his brother, and convicted; but execution was respited, to take the opinion of the judges upon a doubt, whether, upon the circumstances given in evidence, the crime amounted to murder or manslaughter. The prisoner, with the deceased and another brother, and some neighbours, was drinking in a friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to pull and push each other about the room. They then wrestled; one fell, and soon afterwards they played at cudgels by agreement. All this time no token of anger appeared on either side, till the prisoner in the cudgel-play gave the deceased a smart blow on the temple. The deceased thereupon grew angry, and throwing away his cudgel, closed in with the prisoner, and they fought a short space in good earnest: but the company interposing, they were soon parted. The prisoner then quitted the room in anger; and when he got into the street was heard to say, "Damnation seize me if I do not fetch something, and stick him." And being reproved for using such expressions he answered, "I'll be damned to all eternity if I do not fetch something, and run him through the body." The deceased and the rest of the company continued in the room where the affray happened; and in about half an hour the prisoner returned, having put off a thin slight coat he had on when he quitted the room, and put on one of a coarse thick cloth. The door of the room being open into the street, the prisoner stood leaning against the door-post, his left hand in his bosom and a cudgel in his right, looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you will fall on me and beat me." The deceased assured him he would not; and added, "Besides, you think

yourself as good a man as me at cudgels, perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you will keep off your fists." Upon these words the deceased got up and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck sword, crying, "Damn you stand off, or I'll stab you;" and immediately, without giving the deceased time to step back, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little; and the prisoner shortening the sword in his hand, leaped forward toward the deceased and stabbed him to the heart, and he instantly died.

The judges met in Michaelmas vacation at *Lord Mansfield's* chambers, in conference upon this case; and unanimously agreed, that there were in this case so many circumstances of deliberate malice and deep revenge on the defendant's part, that his offence could not be less than wilful murder. He vowed he would fetch something to stick *him*, to run *him* through the body. Whom did he mean by *him?* Every circumstance in the case shewed that he meant his brother. He returned to the company, provided, to appearance, with an ordinary cudgel, as if he intended to try skill and manhood a second time with that weapon; but the deadly weapon was all the while carefully concealed under his coat; which most probably he had changed for the purpose of concealing the weapon. He stood at the door, refusing to come nearer, but artfully drew on the discourse of the past quarrel; and as soon as he saw his brother disposed to engage a second time at cudgels, he dropped his cudgel and betook him to the deadly weapon, which till that moment he had concealed. He did indeed bid his brother stand off, but he gave him no opportunity of doing so before the first pass was made. His brother retreated before the second; but he advanced as fast and took the revenge he

had vowed. The circumstance of the blows before the sword was produced, which probably occasioned the doubt, did not alter the case, nor did the precedent quarrel; because, all circumstances considered, he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed; and the blows were plainly a provocation *sought* on his part, that he might execute the wicked purpose of his heart with some colour of excuse. (*x*)

Provocation sought by the party killing.

In the foregoing case it was considered that the blows with the cudgel were a *provocation sought* by the prisoner, to give occasion and pretence for the dreadful vengeance which he meditated: and it should be observed, that where the provocation is sought by the party killing, and induced by his own act, in order to afford him a pretence for wreaking his malice, it will in no case be of any avail. (*y*) Thus where A. and B. having fallen out, A. said he would not strike, but would give B. a pot of alè to strike him; upon which B. did strike, and A. killed him, it was held to be murder. (*z*) So where A. and B. were at some difference; A. bade B. take a pin out of his (A.'s) sleeve, intending to take the occasion to strike or wound B.: B. accordingly took out the pin, and A. struck him and killed him; and this was ruled murder; first, because it was no provocation when B. did it by the consent of A.; and, secondly, because it appeared to be a malicious and deliberate artifice, by which to take occasion to kill B. (*a*)

Provocation will not avail, if there is cooling time.

It must be further observed also, that in every case of homicide upon provocation, how great soever that provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder. (*b*) Therefore, in the case of the most grievous provo-

(*x*) Mason's case, Fost. 132. 1 East. P. C. c. 5. s. 23. p. 239.

(*y*) 1 East. P. C. c. 5. s. 23. p. 239.

(*z*) 1 Hawk. P. C. c. 31. s. 24.

(*a*) 1 Hale 456.

(*b*) Fost. 296.

cation to which a man can be exposed, that of finding another in the act of adultery with his wife, though it would be but manslaughter if he should kill the adulterer in the first transport of passion, yet if he kill him deliberately and upon revenge after the fact and sufficient cooling time, it would undoubtedly be murder. (*c*) "For let it be observed, that, "in all possible cases, deliberate homicide upon a principle "of revenge is murder. No man under the protection of "the law is to be the avenger of his own wrongs. If they "are of a nature for which the laws of society will give him "an adequate remedy, thither he ought to resort: but be "they of what nature soever, he ought to bear his lot with "patience, and remember that vengeance belongeth only to "the Most High." (*d*) With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. (*e*) In cases of this kind the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given: for if from any circumstances whatever it appear that the party reflected, deliberated, or cooled any time before the fatal stroke given; or if in legal presumption there was time or opportunity for cooling; the killing will amount to murder; as being attributable to malice and revenge, rather than to human frailty. (*f*) And, from the cases which have been stated in the former part of this section, it appears that malice will be presumed, even though the act be perpetrated recently after the provocation received, if the instrument or manner of retaliation be greatly inadequate to the offence given, and cruel and dangerous in its nature: for the law supposes that a party capable of act-

(*c*) Fost. 296. 1 East. P. C. c. 5. s. 20. p. 234. and s. 30. p. 251.

(*d*) Fost. 296. Rom. chap. xii. v. 19.

(*e*) 1 East. P. C. c. 5. s. 30. p. 251.

(*f*) Oneby's case, 2 Lord Raym. 1496.

ing in so outrageous a manner upon a slight provocation must have entertained a general, if not a particular malice, and have previously determined to inflict such vengeance upon any pretence that offered. (*g*)

SECTION II.

CASES OF MUTUAL COMBAT.

WHERE words of reproach or other sudden provocations have led to blows and mutual combat, and death has ensued, the important enquiry will be, whether the occasion was altogether sudden, and not the result of pre-conceived anger or malice: for in no case will the killing, though in mutual combat, admit of alleviation, if the fighting were upon malice. (*h*)

Deliberate duel.

Thus a party killing another in a deliberate duel is guilty of murder: for wherever two persons in cool blood meet and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased; or that he had often declined to meet him, and was prevailed upon to do it by his importunity; or that it was his intent only to vindicate his reputation; (*i*) or that he meant not to kill, but only to disarm, his adversary. (*k*) He has deliberately engaged in an act, highly unlawful, in defiance of the laws, and he must at his peril abide the consequences: and upon this principle, wherever two persons quarrel over night and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or at any time afterwards

(*g*) 1 East. P. C. c. 5. s. 30. p. 252.

(*h*) 1 East. P. C. c. 5. s. 24. p. 241.

(*i*) As where he had been threatened that he should be posted for a coward. 1 Hale 452. and see Rex *v.* Rice, 3 East. R. 581.

(*k*) 1 Hawk. P. C. c. 31. s. 21.

so considerable that in common intendment it must be presumed that the blood was cooled, the person killing will be guilty of murder. (*l*) And in a case where, upon a quarrel happening at a tavern, Lord Morley objected to fighting at that time, on account of the disadvantage he should have by reason of the height of his shoes, and presently afterwards went into a field and fought; the circumstance was relied on as shewing that he did not fight in the first passion. (*m*) So wherever there is an act of deliberation, and a meeting by compact, such mutual combat will not excuse the party killing from the guilt of murder; as where B. challenged A., and A. refused to meet him, but in order to evade the law, told B. that he should go the next day to a certain town about his business, and accordingly B. met him the next day in the road to the same town and assaulted him, whereupon they fought, and A. killed B., it is said that A. seems guilty of murder; but the same conclusion would not follow, if it should appear by the whole circumstances that he gave B. such information accidentally, and not with a design to give him an opportunity of fighting. (*n*) Upon the same principle, if A. and B. meet deliberately to fight, and A. strike B., and pursue B. so closely that B., in safeguard of his own life, kills A., this is murder in B.; because their meeting was a compact, and an act of deliberation, in pursuance of which all that follows is presumed to be done. (*o*)

(*l*) 1 Hawk. P. C. c. 31. s. 22. 1 Hale 453.

(*m*) Bromwick's case, 1 Lev. 180. 1 Sid. 277. 7 St. Tr. 42. Bromwick was indicted for aiding and abetting Lord Morley in the murder of Hastings.

(*n*) 1 Hawk. P. C. c. 31. s. 25.

(*o*) 1 Hale 452. 480. who says, "Thus is Mr. Dalton, cap. 93. p. 241. "(new edit. c. 145. p. 471.) to be un- "derstood." But a *qu.* is added in 1 Hale 452. whether, if B. had really and truly declined the fight, ran away as far as he could, and offered to yield, and yet A. refusing to decline it had attempted his death, and B. after this had killed A. in his own defence, it would excuse him from the guilt of murder; admitting clearly that if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it would be murder. This *quære* of Lord Hale's is discussed in 1 East. P. C. c. 5. s. 54. p. 283. *et sequ.* and it is observed, that Mr. J. Blackstone

And the law so far abhors all duelling in cold blood, that not only the principal who actually kills the other, but also his second, is guilty of murder; (*p*) and it has been held that the second also of the person killed is equally guilty by reason of the countenance given to the principal, and of the compact; but this has been considered as a severe construction by Lord Hale, who thinks that the law in that case was too far strained. (*q*)

Combat upon sudden quarrels.

Where the combat is not an act of deliberation, but the immediate consequence of sudden quarrel, it does not of course fall within the foregoing doctrine: yet in cases of this kind the law may come to the conclusion of malice, if the party killing began the attack with circumstances of undue advantage. (*r*) For in order to save the party making the first assault, upon an insufficient legal provocation, from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be put on an equal footing in point of defence; at least at the onset: and this more particularly where the attack is made with deadly or dangerous weapons. (*s*)

Undue advantage.

(4 Blac. Com. 185.) expressly puts the same case of a duel as Lord Hale, but without subjoining the same doubt; and that it was considered as settled law by the chief justice, in Oneby's case (Lord Raym. 1489). Mr. East, after reasoning in favour of the extenuation of the crime of the duellist so declining to fight, proceeds thus: "Yet still it may be doubtful whether, admitting the full force of "this reasoning, the offence can "be less than manslaughter, or "whether in such case the party "can altogether excuse himself "upon the foot of necessity in self "defence, because the necessity "which was induced from his own "faulty and illegal act, namely, "the agreement to fight, was in the "first instance deliberately foreseen "and resolved upon, in defiance of "the law." 1 East. P. C. c. 5. s. 54. p. 285.

(*p*) 1 Hale 442. 452. 1 Hawk. P. C. c. 31. s. 31.

(*q*) 1 Hale 442. where he says, that the book of 22 E. 3. Coron. 262 was relied upon; but, as he thinks, the law was too far strained in that case; and in page 452 he says, "some have thought it to be "murder also in the second of the "party killed, because done by "compact and agreement. 22 E. "3. 262. *sed qu. de hoc.*"

(*r*) Fost. 295.

(*s*) 1 East. P. C. c. 5. s. 25. p. 242.

Thus if B. draw his sword and make a pass at A., the sword of A. being then undrawn, and thereupon A. draw his sword, and a combat ensue, in which A. is killed, this will be murder; for B., by making the pass, while his adversary's sword was undrawn, shews that he sought his blood; and A.'s endeavour to defend himself, which he had a right to do, will not excuse B. (*t*)

Mawgridge's case.

In *Mawgridge's* case, words of anger happening, *Mawgridge* threw a bottle with great force at the head of Mr. *Cope*, and immediately drew his sword. Mr. *Cope* returned a bottle at the head of *Mawgridge*, and wounded him: whereupon *Mawgridge* stabbed Mr. *Cope*. This was ruled to be murder; for Mawgridge, in throwing the bottle, shewed an intention to do some great mischief: and his drawing immediately shewed that he intended to follow his blow; and it was lawful for Mr. *Cope*, being so assaulted, to return the bottle. (*u*)

Violent conduct of the party killing.

Even if the parties are upon an equal footing when the combat begins, malice may be implied from the violent conduct which the party killing pursued in the first instance; more especially where there is time for cooling, and such expressions are used as manifest deliberation; as in the following case of Major Oneby:—

Oneby's case.

Major Oneby was indicted for the murder of *Mr. Gower;* and a special verdict was found, containing the following statement. The prisoner being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time, began playing at hazard; when Rich, one of the company, asked if any one would set him three half crowns: whereupon the deceased,

(*t*) Fost. 295. 1 Hawk. P. C. c. 31. s. 27.

(*u*) Mawgridge's case, Kel. 128, 129. cited in Fost. 295, 296. where it is said that the judgment in this case was holden to be good law by all the judges of *England*, at a conference in the case of Major *Oneby*, 2 Lord Raym. 1485. 2 Stra. 771.

in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces; and the prisoner at the same time set Rich three half crowns, and lost them to him. Immediately after which, in an angry manner, he turned about to the deceased, and said, it was an impertinent thing to set halfpence, and that he was an impertinent puppy for so doing; to which the deceased answered, whoever called him so was a rascal. Thereupon the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him, the bottle only brushing some of the powder out of his hair. The deceased in return immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose up to fetch their swords, which then hung up in the room, and the deceased drew his sword; but the prisoner was prevented from drawing his by the company. The deceased thereupon threw away his sword; and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over:" and at the same time offered his hand to the prisoner, who made answer, "No, damn you; I will have your blood." After which, the reckoning being paid, all the company, except the prisoner, went out of the room to go home; and he called to the deceased, saying, "Young man, come back; I have something to say to you;" whereupon the deceased returned into the room, and the door was closed, and the rest of the company excluded; but they heard a clashing of swords, and the prisoner gave the deceased the mortal wound. It was also found, that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight; and that the deceased, being asked, upon his death bed, whether he received his wound in a manner among sword men called fair, answered, "I think I did." It was further found that, from the throwing of the bottle, there was no reconciliation between the prisoner and the deceased. Upon these facts all the judges were of opinion that the prisoner

was guilty of murder; he having acted upon malice and deliberation, and not from sudden passion. It should probably be taken, upon the facts found in the verdict and the argument of the chief justice, that, after the door had been shut, the parties were upon an equal footing in point of preparation before the fight began in which the mortal wound was given. The main point then on which the judgment turned, and so declared to be, was the evidence of *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under those circumstances the court were of opinion that the prisoner had had reasonable time for cooling: after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, that he would have his blood. And again, the prisoner remaining in the room after the rest of the company retired, and calling back the deceased by the contemptuous appellation of young man, on pretence of having something to say to him, altogether shewed such strong proof of deliberation and coolness as precluded the presumption of passion having continued down to the time of the mortal stroke. Though even that would not have availed the prisoner under these circumstances: for it must have been implied, according to Mawgridge's case, that he acted upon malice; having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of Mr. Gower, made a deadly assault upon him. (*w*)

Pretended or counterfeit reconciliation.

And though, where there has been an old quarrel between A. and B., and a reconciliation between them, and afterwards, upon a new and sudden falling out, A. kills B., this is not murder; yet if upon the circumstances it appears that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, it is murder. (*x*)

(*w*) Oneby's case, 2 Str. 766. 2 Lord Raym. 1489. (*x*) 1 Hale 451.

SECTION III.

CASES OF RESISTANCE TO OFFICERS OF JUSTICE, TO PERSONS ACTING IN THEIR AID, AND TO PRIVATE PERSONS LAWFULLY INTERFERING TO APPREHEND FELONS, OR PREVENT A BREACH OF THE PEACE.

Resisting and killing officers.

MINISTERS of justice, as bailiffs, constables, watchmen, &c. (*y*) while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom, and equity, and in every principle of political justice; for without it the public tranquillity cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the killing of officers so employed has been deemed murder of malice prepense, as being an outrage wilfully committed in defiance of the justice of the kingdom. This rule is not confined to the instant the officer is upon the spot, and at the scene of action, engaged in the business which brought him thither; for he is under the same protection of the law *eundo, morando, et redeundo:* and therefore if he come to do his office, and, meeting with great opposition, retire, and be killed in the retreat, this will amount to murder; as he went in obedience to the law and in the execution of his office, and his retreat was necessary in order to avoid the danger by which he was threatened. And, upon the same principle, if he meet with opposition by the way, and be killed before he come to the place, such opposition being intended to prevent his doing his duty, (which is a fact to be collected from circumstances appearing in evidence,) this likewise will amount to murder. (*z*)

(*y*) 1 Hale 456, 460. (*z*) Fost. 308, 309.

Persons acting in their aid.

The protection which the law affords to such ministers of justice is not confined to their own persons. Every one coming to their aid, and lending his assistance for the keeping of the peace, or attending for that purpose, whether commanded or not, is under the same protection as the officer himself. (*a*) Nor is the protection which the law affords in these cases confined to the ordinary ministers of justice, or their assistants. It extends, under certain limitations, to the cases of private persons interposing for preventing mischief from an affray, or using their endeavours to apprehend felons, or those who have given a dangerous wound, and to bring them to justice; such persons being likewise in the discharge of a duty required of them by the law. The law is their warrant, and they may not improperly be considered as persons engaged in the public service, and for the advancement of justice, though without any special appointment; and being so considered, they are under the same protection as the ordinary ministers of justice. (*b*)

Private persons.

But with respect to private persons using their endeavours to bring felons to justice, it should be observed, by way of caution, that they must be careful to ascertain, in the first instance, that a felony has actually been committed, and that it has been committed by the person whom they would pursue and arrest. For if no felony has been committed, no suspicion, however well founded, will bring the person so interposing within this especial protection of the law: (*c*) nor will it be extended to those who, where a felony has actually been committed, upon suspicion, possibly well founded, pursue or arrest the wrong person. (*d*) But the law is otherwise in the case of an officer acting in pursuance of a warrant. For if A., being a peace officer, has a warrant from a proper magistrate for the apprehending of B. by name, upon a charge of felony; or if B. stands indicted for felony; or if the hue and cry is levied against B.

(*a*) 1 Hale 462, 463. Fost. 309.
(*b*) Fost. 309.
(*c*) Cro. Jac. 194. 2 Inst. 52, 172.
(*d*) 1 Hale 490. Fost. 318.

by name; in these cases if B., though innocent, fly, or turn and resist, and in the struggle or pursuit is killed by A., or any person joining in the hue and cry, the person so killing will be indemnified; and, on the other hand, if A., or any person joining in the hue and cry, is killed by B., or any of his accomplices joining in that outrage, such killing will be murder: for A. and those joining with him were in this instance in the discharge of a duty required from them by the law; and, in case of their wilful neglect of it, subject to punishment. (*e*)

General rule. Upon these principles it may be laid down as a general rule, that *where persons having authority to arrest or imprison, using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take a part in such resistance;* for it is homicide committed in despite of the justice of the kingdom. This rule is laid down upon the supposition that *resistance* be made, and, upon that supposition, it is conceived that it will hold in all cases, whether civil or criminal; for under circumstances of resistance, in either case, the persons having authority to arrest or imprison may repel force by force, and will be justified if death should ensue in the struggle; while, on the other hand, the persons resisting will be guilty of murder. (*f*) And it has been decided, that if in any quarrel, sudden or premeditated, a justice of peace, constable, or watchman, or even a private person, be slain in endeavouring to keep the peace and suppress the affray, he who kills him will be guilty of murder. (*g*) But in such case the person slain must have given notice of the purpose for which he came, by commanding the parties in the king's name to keep the peace, or by otherwise shewing that it was not his intention to take part in the quarrel, but to appease it; (*h*) unless, indeed, he were an officer within his proper district, and

(*e*) Fost. 318.
(*f*) Fost. 270, 271. 1 Hale 494. 3 Inst. 56. 2 Hale 117, 118.
(*g*) 1 Hawk. P. C. c. 31. s. 48. 54.
(*h*) Fost. 272.

known, or generally acknowledged to bear the office he had assumed. (*i*) As if A., B., and C., be in a tumult together, and D. the constable come to appease the affray, and A. knowing him to be the constable kill him, and B. and C. not knowing him to be the constable, come in, and finding A. and D. struggling, assist and abet A. in killing the constable, this is murder in A., but manslaughter in B. and C. (*k*)

Questions as to authority, legal proceeding, &c.

But it must be well remembered, that this protection of the law is extended only to persons who have authority to arrest or imprison, and who use such authority in a proper manner; and that questions of much nicety and difficulty will often arise upon the points of authority, legality of process, notice, and regularity of proceeding. The consideration of these points will be attempted in a subsequent part of the work; for as the consequences of defects in any of these particulars will generally be to extenuate the crime of killing, and reduce it to manslaughter, the discussion of them will perhaps be better introduced in the chapter relating to that species of homicide. (*l*)

As to persons taking part in the resistance.

With respect to the persons who shall be considered as *taking a part* in the resistance, it may be observed, that if the party who is arrested yield himself and make no resistance, but others endeavour to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, this is murder in them but not in the party arrested: but not so if he do any act to countenance the violence of the rescuers. (*m*) And where *Jackson* and four others, having committed a robbery, were pursued by the country upon hue and cry, and *Jackson* turned upon his pursuers, (others of the robbers being in the same field, and having often resisted the pursuers,) and refusing to yield, killed one of the pursuers; it was held, that inasmuch

(*i*) 1 Hawk. P. C. c. 31. s. 49, 50.
(*k*) 1 Hale 438.
(*l*) *Post*, Chap. II.
(*m*) Sir Charles Stanley's case, Kel. 87.

as all the robbers were of a company and made a *common resistance*, and so one animated the other, all those of the company of the robbers that were in the same field, though at a distance from *Jackson*, were principals, viz. present, aiding and abetting: and it was also held, that one of the malefactors who was apprehended a little before the party was hurt, being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated *Jackson* to kill the party. (*n*)

If a man be arrested, and he and his company endeavour a rescue, and while they are fighting one who knows nothing of the arrest coming by act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequences of joining in any unlawful act, such as fighting; and his ignorance will not excuse him where the fact is made murder by the law without any actual precedent malice, as in the case of killing an officer in the due execution of his office. (*o*) But it should be observed, that in another report of the same case, it is said to have been resolved, that if a person, not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, *with intent to prevent mischief*, it would not have been murder in such person, though the bailiff's assistant were killed by one of the rescuers; (*p*) and it should seem that, in a case of this kind, the material enquiry would be, whether the stranger interfered with the intention of preserving the peace and preventing mischief; for if he interposed for the express purpose of aiding one party against the other, he must abido the consequences at his peril. (*q*)

A. beat B., a constable who was in the execution of his

(*n*) Jackson's case, 1 Hale 464, 465.

(*o*) Sir Charles Stanley's case, Kel. 87.

(*p*) Sir Charles Stanslie and Andrews (case of) 1 Sid. 160. MS. Burnet *accord.* as cited 1 East. P. C. c. 5. s. 63. p. 296.

(*q*) 1 East. P. C. c. 5. s. 83. p. 318.

office, and they were parted; and then C. a friend of A. rushed suddenly in, took up the quarrel, fell upon the constable, and killed him in the struggle; but A. was not engaged in this after he was parted from B. And it was holden by two judges that this was murder only in C., and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to abuse the constable. (*r*) But if a man begin a riot, and the same riot continue, and an officer be killed, he that began the riot would, if he remained present at it, be a principal murderer, though he did not commit the fact. (*s*)

Sissinghurst house case.

A great number of persons assembled in a house called *Sissinghurst*, in *Kent*, issued out and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz. A., was known, the rest were not known; and a warrant was obtained from a justice of peace to apprehend the said A., and divers other persons unknown, who were all together in *Sissinghurst*-house. The constable, with about sixteen or twenty called to his assistance, came with the warrant to the house and demanded entrance, and acquainted some of the persons within that he was the constable, and came with the justice's warrant, and demanded A. with the rest of the offenders that were then in the house; and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors, but going in commanded the rest of the company to stand to their staves. The constable and his assistants fearing mischief went away, and being about five rod from the door, B., C., D., E., F., &c. about fourteen in number, issued out and pursued the constable and his assistants. The constable commanded the peace, yet they fell on, and killed one of the assistants of the constable, and

(*r*) By Holt, C. J. and Rooksby, at *Hertford*, temp. Will. 3. *ad incipium* MS. Tracy 53. 1 East. P. C. c. 5. s. 63. p. 296. and see also Fost. 353.

(*s*) Wallis and Others (case of), 1 Salk. 334.

wounded others, and then retired into the house to the rest of their company which were in the house, whereof the said A. and one G. that read the warrant were two. For this A., B., C., D., E., F., G., and divers others, were indicted of murder, and tried at the king's bench bar, when these points were unanimously determined:

1. That although the indictment were, that B. gave the stroke, and the rest were present aiding and assisting, though in truth C. gave the stroke, or that it did not appear upon the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party, according to the resolution in *Mackally's* case. (*t*)

2. That in this case all that were present and assisting to the rioters were guilty of the death of the party slain, though they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled the riot, were in law present aiding and assisting, and principals, as well as those that issued out and actually committed the assault; for it was but within five rod of the house, and in view thereof, and all done as it were in the same instant. (*u*)

4. That here was sufficient notice that it was the constable, before the man was killed. 1. Because he was the constable of the same vill. 2. Because he notified his busi-

(*t*) 9 Co. 67, b.

(*u*) *Vide* Lord Dacre's case. The Lord *Dacre* and divers others came to shoot deer in the park of one *Pelham*. Mayden, one of the company, killed the keeper in the park, the Lord Dacre and the rest of the company being in other parts of the park; and it was ruled that it was murder in them all, and they died for it. Crompt. 25, a. Dalt. c. 145. p. 472. 34 Hen. VIII. B. Coron. 172. See also Moor 86. Kelw. 56. 1 Hale 439.

ness at the door before the assault, viz. that he came with the justice's warrant. 3. Because, after his retreat and before the man was slain, the constable commanded the peace, and, notwithstanding, the rioters fell on and killed the party.

5. It was resolved that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those who come in to the assistance of the constable, though not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That although the constable retired with his company upon the not delivering up of A. yet the killing of the assistant of the constable in that retreat was murder. 1. Because the retreat was one continued act in pursuance of his office; being necessary when he could not attain the object of his warrant, and being in effect a continuation of the execution of his office, and under the same protection of the law as his coming was. 2. Principally because the constable, in the beginning of the assault, and before the man was stricken, commanded the peace.

8. It seems that even if the constable had not commanded the peace, yet as he and his company came about what the law allowed them, and, when they could not effect it fairly, were going their way, the rioters pursuing them and killing one made the offence murder in them all; for the act was done without provocation, and the constable and his company were peaceably retiring; but this point was not relied upon, because there was enough upon the former point to convict the offenders. In the conclusion the jury found nine of them guilty and acquitted those within, not because they were absent, but because there was no clear

evidence that they consented to the assault, as the jury thought; and therefore judgment was given against the nine to be hanged. (*w*)

SECTION IV.

CASES WHERE THE KILLING TAKES PLACE IN THE PROSECUTION OF SOME OTHER CRIMINAL, UNLAWFUL, OR WANTON ACT.

If an action, unlawful in itself, be done deliberately and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder. (*x*)

Particular malice to one individual falling upon another.

Under this head may be mentioned the cases of particular malice to one individual falling by mistake or accident upon another, which, by the ignorance or lenity of juries, have been sometimes brought within the rule of accidental death. But though, in a loose way of speaking, it may be called accidental death when a person dies by a blow not intended against *him*, the case is considered by the law in a very different light. Thus, if it appears from circumstances that the injury intended to A. whether by poison, blow, or any other means of death, would have amounted to murder if he had been killed by it, it will amount to the same offence if B. happen to fall by the same means: (*y*) so that if C.

(*w*) *Sissinghurst-house* case, 1 Hale 461, 2, 3. The award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgments given in the king's bench have commonly been, Et dictum est marescallo, &c. quod faciat executionem periculo incumbente.

(*x*) Fost. 261.

(*y*) *Id. ibid.* 1 Hale 441. Williams's case, 1 Hale 469, which Holt, C. J. thought would have been a case of murder, if the indictment had been so laid. See Mawgridge's case, Kel. 131.

having malice against A., strikes at and misses him, but kills B., this is murder in C.: (*z*) and upon the same principle, if A. and B. engage in a deliberate duel, and a stranger coming between them to part them is killed by one of them, it is murder in the party killing. (*a*) And it has also been resolved, that where A. had malice against D., the master of B., and assaulted him, and upon B. the servant coming to the aid of his master, A. killed B., it was murder in A. as much as if he had killed the master. (*b*) So, where A. gave a poisoned apple to his wife intending to poison her, and the wife, ignorant of the matter, gave it to a child who took it and died; this was held murder in A., though he being present at the time endeavoured to dissuade his wife from giving the apple to the child. (*c*) And, upon the same principle, it was held to be murder where A. mixed poison in some medicine sent by an apothecary to her husband, which did not kill him, but afterwards killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. (*d*)

So, where a person gave medicine to a woman to procure an abortion, (*e*) and where a person put skewers into the

Murder in attempting to procure an abortion.

(*z*) 1 East. P. C. c. 5. s. 17. 230.

(*a*) 1 Hale 441. Dalt. c. 145. p. 472. It appears to have been holden in such a case, where the combating was by malice prepense, that the killing of the person who came to part them was murder in *both* the combatants. 22 Edw. III. Coron. 262. Lambard out of Dallison's Report, p. 217. But Lord Hale thinks that is mistaken, and that it is not murder in both, unless both struck him who came to part them, and says that by the book of 22 Ass. 71. Coron. 180. (which seems to be the same case more at large) he only that gave the stroke had judgment, and was executed. 1 Hale 441. to which this note is subjoined; "the other does not appear to have been before the court; but, upon putting the case, the court said, he that struck is guilty of felony, but said nothing as to him who did not strike."

(*b*) 1 Hale 438.

(*c*) Sanders's case, Plowd. 474. 1 Hawk. P. C. c. 31. s. 45. 1 Hale 436.

(*d*) Gore's case, 9 Co. 81. 1 Hawk. P. C. c. 31. s. 45. 1 Hale 436.

(*e*) 1 Hale 429.

womb of a woman for the same purpose, (*f*) by which in both cases the women were killed, these acts were held clearly to be murder; for, though the death of the women was not intended, the acts were of a nature deliberate and malicious, and necessarily attended with great danger to the persons on whom they were practised.

General malice or depraved inclination to mischief.

There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, fall where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder. (*g*) Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder. (*h*) So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is univérsal malice. (*i*) And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual: for it is no excuse that the party was bent upon mischief generally. (*k*)

Death from an unlawful act done with

Whenever an unlawful act, an act *malum in se*, is done in prosecution of a *felonious* intention, and death ensues, it

(*f*) Tinckler's case, 1 East. P. C. c. 5. s. 17. p. 230. and s. 124. p. 354.

(*g*) 1 Hale 475. 1 East. P. C. c. 5. s. 18. p 231.

(*h*) 1 Hale 475. 4 Blac. Com. 200. 1 Hawk. P. C. c. 29. s. 12. 1 East. P. C. c. 5. s. 18. p. 231. Hawkins, speaking of the instance of the person riding a horse used to kick amongst a crowd, says, it would be murder though the rider intended no more than to divert himself by putting the people into a fright. 1 Hawk. P. C. c. 31. s. 68. and see *ante*, 622, 3.

(*i*) 4 Blac. Com. 200.

(*k*) 1 Hale 475. 3 Inst. 57. 1 East. P C. c. 5. s. 18. p. 231.

will be murder: as if A. shoot at the poultry of B. intending to steal the poultry and by accident kill a man, this will be murder by reason of the felonious intention of stealing. (*l*) And it has been holden, that if such offenders as are mentioned in the statute *de malefactoribus in parcis*, (*m*) kill the keeper, &c. it is murder in all, although it appear that the keeper ordering them to stand assaulted them first, and that they fled, and did not turn till one of the keepers' men had fired and hurt one of their companions. (*n*)

felonious intent.

Also, where the intent is to do some great *bodily harm* to another, and death ensues, it will be murder; as if A. intend only to *beat* B. in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequence. He beat B. with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did. (*o*) So, if a large stone be thrown at one with a deliberate intend to hurt, though not to kill him, and by accident it kill him, or any other, this is murder. (*p*) But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases. (*q*)

Death from an act intending bodily harm.

Where divers persons resolve generally *to resist all op-*

Where several

(*l*) Fost. 258, 259.

(*m*) 21 Edw. I. st. 2. 1 Hale 491. The statute 3 and 4 W. and M. c. 10. s. 5. empowers owners of deer in any inclosed land, or any persons under them, to resist offenders in like manner as in ancient parks. And by stat. 4 and 5 W. and M. c. 23. s. 4. lords of manors, or any others authorized by them as gamekeepers, may resist offenders in the night within their respective manors or royalties, in the same manner and with equal indemnity as if the fact had been committed in any ancient chase, &c.

(*n*) 1 East. P. C. c. 5. s. 31. p. 256. citing 1 MS. Sum. 145. 175. Sum. 37. 46. Palm. 546. 2 Roll. Rep. 120.

(*o*) Fost. 259.

(*p*) 1 Hale 440, 441.

(*q*) Kel. 127. 1 East. P. C. c. 5. s. 32. p. 257.

join to do an unlawful act.

posers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, as by committing a violent disseisin with great numbers of people, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must, when they engage in such bold disturbances of the public peace, at their peril abide the event of their actions. And therefore if in doing any of these acts they happen to kill a man, they are all guilty of murder. (*r*) But it should be observed, that in order to make the killing by any murder in all of those who are confederated together for an unlawful purpose, merely on account of the unlawful act done or in contemplation, it must happen during the actual strife or endeavour, or at least within such a reasonable time afterwards, as may leave it probable that no fresh provocation intervened. (*s*)

The fact must appear to have been committed strictly in prosecution of the purpose for which the party was assembled.

And it should also be observed, that the fact must appear to have been committed strictly *in prosecution of the purpose for which the party was assembled;* and therefore, if divers persons be engaged in an unlawful act, and one of them, with malice prepense against one of his companions, finding an opportunity, kill him, the rest are not concerned in the guilt of that act, because it had no connection with the crime in contemplation. (*t*) So, where two men were beating another man in the street, and a stranger made some observation upon the cruelty of the act, upon which one of the two men gave him a mortal stab with a knife; and both the men were indicted as principals in the murder; although both were doing an unlawful act in beating the man, yet as the death of the stranger did not ensue upon that act, and as it appeared that only one of them intended

(*r*) 1 Hawk. P. C. c. 31. s. 51. Staundf. 17. 1 Hale 439, *et sequ.* 4 Blac. Com. 200. 1 East. P. C. c. 55. s. 33. p. 257.

(*s*) 1 East. P. C. c. 5. s. 34. p. 259.

(*t*) 1 Hawk. P. C. c. 31. s. 52. Fost. 351. And see the charge of Foster, J. on a special commission for the trial of Jackson and Others, at *Chichester*, 9 St. Tri. (ed. by Hargr.) 715, *et sequ.*

any injury to the person killed, the judges were of opinion that the other could not be guilty, either as principal or accessory; and he was acquitted. (*u*)

In a case where a party of smugglers were met and opposed by an officer of the crown, and during the scuffle which ensued a gun was discharged by a smuggler which killed one of his own gang, the question was, whether the whole gang were guilty of this murder; and it was agreed by the court, that if the king's officer, or any of his assistants, had been killed by the shot, it would have been murder in all the gang; and also, that if it had appeared that the shot was levelled at the officer, or any of his assistants, it would also have amounted to murder in the whole of the gang, though an accomplice of their own were the person killed. (*w*) The point upon which this case turned was, that it did not appear from any of the facts found, that the gun was discharged *in prosecution of the purpose for which the party was assembled.* (*x*) In another case the prisoners were hired by a tenant to assist him in carrying away his household furniture in order to avoid a distress. They accordingly assembled for this purpose armed with bludgeons and other offensive weapons, and a violent affray took place between them and the landlord of the house, who, accompanied on his part by another set of men, came to prevent the removal of the goods. The constable was called in and produced his authority, but could not induce them to disperse: and, while they were fighting in the street, one of the company, but which of them was not known, killed a boy who was standing at his father's door looking on, but totally unconcerned in the affray. The question was, whether this was murder in all the company; and Holt, C. J. and Pollexfen, C. J. were of opinion that it was murder in all the company, because they were all engaged in an unlawful act, by proceed-

(*u*) 1 Hawk. P. C. c. 31. s. 52.

(*w*) Plummer's case, Kel. 109.

(*x*) Fost. 352. and see Mansell and Herbert's case, 1 Hale 440, 441, cited from Dy. 128, b.

ing in the affray after the constable had interposed and commanded them to keep the peace; especially as the manner in which they originally assembled, namely, with offensive weapons and in a riotous manner, was contrary to law. (*y*) But the majority of the judges held, that as the boy was found to be unconcerned in the affray, his having been killed by one of the company could not possibly affect the rest; for the homicide did not happen in prosecution of the illegal act. (*z*) And it seems that this opinion proceeded upon the ground that there was no evidence to shew that the stroke by which the boy was killed was either levelled at any of the opposing party, or was levelled at him upon the supposition that he was one of the opponents, and therefore that it was not given in prosecution of the purpose for which the party was assembled. (*a*)

SECTION V.

CASES WHERE THE KILLING TAKES PLACE IN CONSEQUENCE OF SOME LAWFUL ACT BEING CRIMINALLY OR IMPROPERLY PERFORMED, OR OF SOME ACT PERFORMED WITHOUT PROPER AUTHORITY.

Due caution should be observed by all persons in the discharge of the business and duties of their respective stations, lest they should proceed by means which are criminal or improper, and exceed the limits of their authority. This will more especially require the attention of officers of justice, and should be kept in mind by those who have to ad-

(*y*) They cited Stamf. 17, 40. Fitz. Cor. 350. Cromp. 241.

(*z*) Hodgson and others (case of) 1 Leach 6. See Plummer's case, *ante*, note (*w*) 12 Mod. 629. Thompson's case, Kel. 66. Anon. cited by Holt, C. J. 1 Leach 7. note (*a*), and a case Anon. 8 Mod. 165. See also Keilw. 161. and Bothwick's case, Dougl. 202.

(*a*) 1 East. P. C. c. 5. s. 33. p. 258, 259, and see the remarks of Lord Hale upon the case of Mansell and Herbert (Dy. 128, b.) in 1 Hale 440, 441.

minister correction *in foro domestico*, and by persons employed in those common occupations from which danger to others may possibly arise.

Officers of justice acting improperly.

It has been shewn in a former part of this chapter, (*b*) that *ministers of justice*, when in the execution of their offices, are specially protected by the law; but it behoves them to take care that they do not misconduct themselves in the discharge of their duty, on pain of forfeiting such protection. Thus, though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence; (*c*) yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. (*d*) And if he should kill where no resistance is made, it will be murder: and it is presumed that the offence would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. (*e*) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken; (*f*) yet where a party is accused of a misdemeanour only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him it will in general be murder. (*g*) So, in civil suits, if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made, or out of custody in execution for debt, and the officer not being able to overtake him make use of any deadly weapon, and by so doing, or by other means, intentionally kill him

(*b*) *Ante*, 650. *et sequ.*
(*c*) *Ante*, 652.
(*d*) 4 Blac. Com. 180.
(*e*) 1 East. P. C. c. 5. s. 63. p. 297.
(*f*) 1 Hale 481. 4 Blac. Com. 179. Fost. 271.
(*g*) Fost. 271. 1 Hale 481.

in the pursuit, it will amount to murder. (*h*) And also in the case of impressing seamen, if the party fly, it is conceived that the killing by the officer in the pursuit to overtake him would be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanours; paying attention, nevertheless, to those usages which have prevailed in the sea-service in this respect, so far as they are authorised by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. (*i*)

If an officer make an arrest out of his proper district, or have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law: and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (*k*) Thus where a warrant had been directed from the Admiralty to Lord Danby to impress seamen, and one Browning his servant, without any warrant in writing, (*l*) impressed a person who was no seaman, and upon his trying to escape killed him, it was adjudged murder. (*m*) And where the captain of a man of war had a warrant for impressing mariners, upon which a deputation was indorsed in the usual form to the

(*h*) 1 Hale 481. Fost. 271. 1 East. P. C. c. 5. s. 74. p. 306, 307. Laying hold of the prisoner and pronouncing words of arrest, is an actual arrest; or it may be made without actually laying hold of him, if he submit to the arrest. Horner *v.* Baltyn and another, Bull. N. P. 62. and see 1 East. P. C. c. 5. s. 68. p. 300.

(*i*) 1 East. P. C. c. 5. s. 75. p. 308. Borthwick's case, Dougl. 207.

(*k*) 1 East. P. C. c. 5. s. 78. p. 312.

(*l*) A *verbal* delegation of the power to impress seamen was held bad in Borthwick's case, Dougl. 207. though it appeared to be the usage of the navy, and that the petty officers had usually acted without any other authority than such verbal orders. But the usage was considered as directly repugnant to the laws of the land.

(*m*) O. B. 13th October 1690, Rokeby's MS. cited in Serjt. Foster's MS. and in 1 East. P. C. 312.

lieutenant; and the mate, with the prisoner Dixon, and some others, but without either the captain or lieutenant, impressed one Anthony How, who never was a mariner, but was servant to a tobacconist, and upon How making some resistance, and for that purpose drawing a knife, which he held in his hand, Dixon, with a large walking stick, about four feet long, and a great knob at the end of it, gave How a violent blow on the side of his head, of which he died in about fourteen days; it was adjudged murder. The capture and detention of How were considered as unlawful on two accounts; first, because neither the captain or lieutenant were present, and Dixon was no lawful officer for the purpose of pressing, nor an assistant to a lawful officer; secondly, because How was not a proper object to be impressed. It was lawful therefore, under these circumstances, for How to defend himself; and Dixon's killing him, in consequence of an unlawful capture and detention, was murder. (*n*)

Duress of imprisonment by gaolers.

Gaolers and their officers are under the same special protection as other ministers of justice: but in regard to the great power which they have, and, while it is exercised in moderation, ought to have over their prisoners, the law watches their conduct with a jealous eye. If therefore a prisoner under their care die, whether by disease or accident, the coroner, upon notice of such death, which notice the gaoler is obliged to give in due time, ought to resort to the gaol; and there, upon view of the body, make inquisition into the cause of the death; and if the death was owing to cruel and oppressive usage on the part of the gaoler or any officer of his, or, to speak in the language of the law, to *duress of imprisonment*, it will be deemed wilful murder in the person guilty of such duress. (*o*) The person *guilty* of such duress will be the party liable to prosecution, because,

(*n*) Dixon's case, *Kingst.* Ass. 1756, cor. Dennison, J. (said to be 1758 in Serjeant Foster's MS.) cited in 1 East. P. C. c. 5. s. 80. p. 313.

(*o*) Fost. 321. 1 Hale 465.

though in a civil suit, the principal may in some cases be answerable in damages to the party injured through the default of the deputy; yet, in a capital prosecution, the sole object of which is the punishment of the delinquent, each man must answer for his own acts or defaults. (*p*)

A gaoler, knowing that a prisoner infected with the small pox lodged in a certain room in the prison, confined another prisoner against his will in the same room. The second prisoner, who had not had the distemper, of which fact the gaoler had notice, caught the distemper, and died of it: this was holden to be murder. (*q*)

Case of Huggins and Barnes.

Huggins was warden of the Fleet prison, with power to execute the office by deputy, and appointed one Gibbon, who acted as deputy. Gibbon had a servant Barnes, whose business it was to take care of the prisoners, and particularly of one Arne; and Barnes put Arne into a new-built room, over the common sewer, the walls of which were damp and unwholesome, and kept him without fire, chamber pot, or other necessary convenience, for forty-four days, when he died. It appeared that Barnes knew the unwholesome situation of the room, and that Huggins knew the condition of the room fifteen days at least before the death of Arne, as he had been once present at the prison, and seen Arne under such duress of imprisonment, and turned away; at which time Barnes shut the door of the room, in which Arne continued till he died. It was found that Arne had sickened and died by duress of imprisonment, and that during the time Gibbon was deputy Huggins sometimes acted as warden. Upon these facts the court were clearly of opinion that Barnes was guilty of murder. But they thought that Huggins was not guilty, as it could not be inferred from merely seeing the deceased once during his confine-

(*p*) Fost. 322. Huggins and Barnes (case of) 2 Str. 882.

(*q*) Fost. 322. referring to the case of Castell *v.* Bambridge and Corbet (an appeal of murder), 2 Str. 856.

ment, that Huggins knew that his situation was occasioned by the improper treatment, or that he consented to the continuance of it: and they said, that it was material that the species of duress by which the deceased came to his death could not be known by a bare looking in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life: and it was likewise material that no application was made to Huggins, which perhaps might have altered the case. And the court seemed also to think that as Barnes was the servant of Gibbon, and Gibbon had the actual management of the prison, the accidental presence of the principal would not amount to a revocation of the authority of the deputy. (*r*)

Duty of officers in the execution of criminals.

With respect to the duty of officers in the execution of criminals, it has been laid down as a rule, *that the execution ought not to vary from the judgment*, for if it doth the officer will be guilty of felony at least, if not of murder. (*s*) And in conformity to this rule it has been holden, that if the judgment be to be hanged, and the officer behead the party, it is murder; (*t*) and that even the king cannot change the punishment of the law by altering the hanging or burning into beheading, though, when beheading is part of the sentence, the king may remit the rest. (*u*) But others have thought more justly that this prerogative of the crown, founded in mercy and immemorially exercised, is part of the common law; (*w*) and that though the king cannot by his prerogative vary the execution so as to aggravate the punishment beyond the intention of the law, yet he may mitigate the pain or infamy of it: and accordingly that an officer acting upon

(*r*) Huggins and Barnes (case of) 2 Stra. 882. 2 Lord Raym. 1574. Fost. 322. 1 East. P. C. c. 5. s. 92. p. 331, 332.

(*s*) 1 Hale 501. 2 Hale 411. 3 Inst. 52, 211. 4 Blac. Com. 179.

(*t*) 1 Hale 433, 454, 466, 501. 2 Hale 411. 3 Inst. 52. 4 Blac. Com. 179.

(*u*) 3 Inst. 52. 2 Hale 412.

(*w*) Fost. 270. F. N. B. 244 b. 19 Rym. *Fœd.* 284.

a warrant from the crown for beheading a person under sentence of death for felony would not be guilty of any offence. (*x*) But the rule may apply to an officer varying from the judgment of his own head, and without warrant or the colour of authority. (*y*)

Correction in foro domestico.

Parents, masters, and other persons having authority *in foro domestico,* may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the fact is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, his belly stamped upon, and so killed, it will be murder. (*z*) Thus, where a master had employed his apprentice to do some work in his absence, and on his return found it had been neglected, and thereupon threatened to send the apprentice to Bridewell, to which the apprentice replied, "I may as well work there, as with such a master;" upon which the master struck the apprentice on the head with a bar of iron which he had in his hand, and the apprentice died of the blow; it was held murder: for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as

(*x*) Fost. 268. 4 Blac. Com. 405. 1 East. P. C. c. 5. s. 96. p. 335.

(*y*) It was, however, the practice, founded in humanity, when women were condemned to be burned for treason, to strangle them at the stake before the fire reached them, though the letter of the judgment was that they should be burnt in the fire *till they were dead.* Fost. 268. The 30 Geo. III. c. 48. now directs that they shall be hanged as other offenders.

(*z*) 1 Hawk. P. C. c. 29. s. 5. 1 Hale 453, 473. Keite's case, 1 Lord Raym. 144.

may probably kill them; otherwise, under pretence of correction, a parent may kill his child; and a bar of iron is no instrument of correction. (*a*)

Persons following their common occupations.

If persons, in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder. Thus, if workmen throwing stones, rubbish, or other things from an house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred, (*b*) and the act will amount to murder from its gross impropriety, (*c*) So if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder. (*d*) The act is wilful and deliberate, and manifests a heart regardless of social duty. (*e*)

SECTION VI.

OF THE INDICTMENT, TRIAL, &c.

Indictment.

Although the prisoner may be charged with murder by the *inquisition of the coroner*, it is usual also to prefer an *indictment* against him. And it is said to be proper to frame an indictment for the offence of murder in all cases where the degree of the offence is at all doubtful; questions of homicide being frequently of a complicated nature, and the prisoner, if charged with murder, having an advantage in

(*a*) Fost. 262. Gregg's case, Kel. 64.

(*b*) *Ante*, 660.

(*c*) 3 Inst. 57. 4 Blac. Com. 194. 1 East. P. C. c. 5. s. 38. p. 262.

(*d*) 1 Hale 475. Fost. 263. 1 East. P. C. c. 5. s. 38. p. 263.

(*e*) Fost. 263.

this respect, that an acquittal is a perpetual bar against any other indictment for the same death. (*f*)

With respect to the place in which the indictment is to be preferred, it will be necessary to state some of the legislative enactments by which trials for murder are regulated.

In what place the offender must be indicted.

Murder, like all other offences, must regularly, according to the common law, be enquired of in the county in which it was committed. It appears however to have been a matter of doubt at the common law, whether, when a man died in one county of a stroke received in another, the offence could be considered as having been completely committed in either county; (*g*) but by the statute 2 and 3 Edw. VI. c. 24. s. 2. it is enacted, that the trial shall be in the county where the death happens. The fourth section of this statute also makes provision for the trial of an *accessory*, where the murder is committed in one county and the party is accessory thereto in any other county, and enacts, that an indictment against such accessory in the county where the offence of accessory is committed, shall be as effectual as if the principal offence had been committed within the county where the indictment against the accessory shall be found. And authority is given to the judges of gaol delivery, &c. or two of them, of the county where the offence of the accessory shall have been committed, on suit to them made, to write to the keeper of the records where the principal shall have been convicted, to certify them whether such principal be attainted, convicted, or otherwise discharged, which he is required to certify under his seal. (*h*)

(*f*) 1 East. P. C. c. 5. s. 105. p. 340. *Autrefois acquit* would be a good plea to an indictment for manslaughter of the same person; but it is also laid down that if the party be indicted for manslaughter and acquitted, he cannot be indicted for the same death as murder, the crimes differing only in degree, and the fact being the same. 2 Hale 246. Holcroft's case, 4 Rep. 46 b. And *autrefois acquit* or *attaint* upon an indictment for murder, is a good bar to an indictment for petit treason for the same fact, and so *è converso*, Fost. 329.

(*g*) 2 Hawk. P. C. c. 25. s. 36. 1 East. P. C. c. 5. s. 128. p. 361.

(*h*) 2 and 3 Edw. VI. c. 24. s. 4.

If a person be stricken and die in the county of A., and the body be found in B., it is to be removed into A. for the coroner of that county to take the inquest. (*i*)

Trial, when the murder is committed in Wales.

By the statute 26 Hen. VIII. c. 6. it is enacted, that murder and other felonies committed in *Wales* may be enquired of and tried upon an indictment in the next adjoining English county where the king's writ runneth: and *Herefordshire* has been holden to be the next adjoining English county to *South Wales*, and *Shropshire* to *North Wales*: (*j*) but it has been considered as a doubtful point in what place the trial ought to be, supposing the stroke given in an English county, and the death in *Wales*. (*k*)

There are also statutes which relate to the trial of murder, and other offences which have been committed upon the sea, and either within the king's dominions or without.

When it is committed upon the sea, or in any haven, &c. where the admiral has jurisdiction; or in foreign parts.

The 28th Hen. VIII. c. 15. s. 1. enacts, that all felonies, murders, &c. committed upon the sea, or in any haven, river, creek, or place where the admiral has or pretends to have power, authority, or jurisdiction, shall be enquired, tried, &c. in such shires and places in the realm as shall be limited by the king's commission, in like form as if such offences had been committed upon the land. The proceedings upon this statute and the extent of the admiralty jurisdiction have been already considered: (*l*) it may however be again mentioned in this place, that by the 15 Rich. II. c. 3. the admiral has jurisdiction given to him to enquire "of the death of

Ante 56. Before this statute, the coroner, *super visum corporis*, might have enquired at common law, of all accessories or procurers before the fact, though the procurement were in another county. 1 Hale 427.

(*i*) 2 Hale 66. 1 MS. Sum. 54. 1 East. P. C. c. 5. s. 127. p. 361.

(*j*) Athos' case, (father and son,) 8 Mod. 136. Parry's case, 1 Leach 125. 1 Starkie Crim. Plead. 15.

(*k*) 1 East. P. C. c. 5. s. 129. p. 363. *et sequ.* where see a learned argument upon this point. And see also 1 Starkie Crim. Plead. 14, 15.

(*l*) *Ante*, 144.

"a man, and of a mayhem done in great ships hovering in "the main stream of great rivers, only beneath the bridges "of the same rivers, nigh to the sea, and in none other "places of the same rivers." In a late case, at the Admiralty session, of a murder committed in a part of *Milford* haven, where it was about three miles over, about seven or eight miles from the mouth of the river or open sea, and about sixteen miles below any bridges over the river, a question was made, whether the place where the murder was committed was to be considered as within the limits to which commissions granted under the statute 28 Hen. VIII. c. 15. extend by law: and upon reference to the judges, they were unanimously of opinion that the trial was properly had. (*m*) With respect to *accessories* to felonies committed upon the high seas, it is enacted by the 43 Geo. III. c. 113. s. 5, that they shall be liable to be tried by such court and in such manner as is directed by the statute 28 Hen. VIII. c. 15. for trying felonies committed upon the high seas. (*n*)

By a late statute, the 46 Geo. III. c. 54. all murders and other offences committed upon the sea, or in any haven, river, &c. where the admiral has jurisdiction, may be enquired of and tried according to the common course of the laws of the realm, used for offences committed upon the land within the realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories under the king's commission; and the commissioners are to have the same powers for such trial within any such island, &c. as any commissioners appointed under the statute 28 Hen. VIII. c. 15. would have for the trial of offences within the realm. The provisions of this act are extended by a more recent statute, the 57 Geo. III. c. 53., to murders and manslaughters committed in places not within his majesty's dominions. It enacts, that murders and manslaughters committed on land at the settlement in the bay of *Hon-*

(*m*) Bruce's case, 2 Leach 1093. *ante*, 146. (*n*) *Ante*, 57.

duras, by any person residing or being within the settlement, and in the islands of *New Zealand* and *Otaheite*, or within any other islands, countries, or places not within his majesty's dominions, nor subject to any European state or power, nor within the territory of the united states of *America*, by the master or crew of any British ship or vessel, or any of them, or by any person sailing in or belonging thereto, or that shall have sailed in and belonged to, and have quitted any British ship or vessel to live in any of the said islands, &c., or that shall be there living, may be tried and punished in any of his majesty's islands, plantations, colonies, &c. by the king's commission issued by virtue of the 46 Geo. III. c. 54. in the same manner as if such offences had been committed on the high seas. (*o*)

With respect to murders and other capital crimes committed in *Newfoundland* and the isles thereto belonging, it is enacted by the 10 and 11 W. III. c. 25. s. 13. that they may be tried in any county of England: and though the king is enabled by subsequent statutes, (*p*) to erect courts of civil and criminal jurisdiction in that country, it does not appear that those statutes take away the jurisdiction given by the statute 10 and 11 W. III.

Trial.—After examination before the king's council.

The 33 Hen. VIII. c. 23. enacts, that if any person being examined before the king's council, or three of them, upon treasons, murders, &c. confess such offences, or the council or three of them, upon such examination, think any person so examined to be vehemently suspected of any treason or murder, the king's commission may be made to such persons and into such shires and places as shall be named and appointed by the king for the speedy trial of such offenders; and gives power to the commissioners to enquire and determine such offences within the shires and places limited by their commission,

(*o*) 57 Geo. III. c. 53. s. 1. The second section provides that the act shall not be construed to repeal the 33 Hen. VIII. c. 23.

(*p*) 32 Geo. III. c. 46. 33 Geo. III. c. 76. continued by 34 Geo. III. c. 44. and 35 Geo. III. c. 25.

in whatsoever other shire or place, *within the king's dominions or without*, such offences so examined were done or committed. This statute did not extend to accessories; but by the 43 Geo. III. c. 113. s. 6. it is provided that its powers and authorities shall be extended to the offence of procuring, &c. or otherwise becoming an accessory *before* the fact to any murder. (*q*) It was in one case objected that the statute 33 Hen. VIII. c. 23. did not extend to murders committed out of the realm; but the court over-ruled the objection, the statute being clear as to that point. (*r*)

Trial.--Where the wound, &c. is upon the sea, or abroad, and the death on shore; or where the wound, &c. is upon the shore, and the death at sea or abroad.

Where a person was struck, &c. upon the high seas, and died upon shore, it was holden that the admiral had no cognizance of the offence by virtue of his commission. (*s*) And it was doubtful whether such offence could be tried at common law: (*t*) the statute 2 Geo. II. c. 21. has therefore made provision for such cases. It enacts, "that where any "person shall be feloniously stricken or poisoned upon the "sea, or at any place out of *England*, and shall die of the "same stroke or poisoning within *England*; or where any "person shall be feloniously stricken or poisoned at "any place within *England*, and shall die of the same "stroke or poisoning upon the sea, or at any place out of "*England*; in either of the said cases an indictment thereof "found by the jurors of the county in *England* in which "such death, stroke, or poisoning, shall happen respectively "as aforesaid, whether it shall be found before the coroner "upon the view of such dead body, or before the justices, "&c. who shall have authority to enquire of murders, shall "be as good and effectual in the law, as well against the "principals in any such murder as the accessories there-"unto, as if such felonious stroke and death thereby ensu-"ing, or poisoning and death thereby ensuing, and the

(*q*) By s. 7. this act of the 43 Geo. III. is not to extend to *Ireland*.

(*r*) Ealing's case, 1 East. P. C. c. 5. s. 133. p. 369.

(*s*) 2 Hale 17, 20. 1 East. P. C. c. 5. s. 131. p. 365, 366. *Ante*, 146.

(*t*) *Id. Ibid.* and 1 Hawk. P. C. c. 31. s. 12.

" offence of such accessories, had happened in the same " county where such indictment shall be found." And it further provides, that the justices of gaol delivery, &c. shall proceed thereon, and that the offender shall receive the like trial, &c. as if the murder and offence of such accessories had happened in that county in which such indictment is found.

Where a person standing on the shore of a harbour fired a loaded musket at a revenue cutter which had struck upon a sand bank in the sea, about a hundred yards from the shore, by which another was maliciously killed on board the boat, it was holden that the trial must be in the Admiralty court, and not at common law. (*u*)

Form of the indictment.

A few of the general rules relating to the form of the indictment may be mentioned in this place.

Description of the party killed.

If the name of the party killed be not known, it may be laid to be a certain person to the jurors unknown; (*w*) and it is not necessary to state the addition of the party killed, though it may sometimes be convenient to do so for the sake of distinction. (*x*) Nor is it necessary to allege that the party killed was " in the peace of God and of our lord the king, &c." though such words are commonly inserted, for they are not of substance, and perhaps the truth may be that the party was at the time actually breaking the peace. (*y*)

Statement of the manner of the death, and the means by which it was effected.

The indictment should in all respects be adapted as closely to the truth as possible. It is essentially necessary to set forth particularly the manner of the death, and the means by which it was effected: (*z*) and this statement may, according

(*u*) Coombe's case, 1785—6. 1 Hawk. P. C. c. 37. s. 17. 1 Leach 388. 1 East. P. C. c. 5. s. 131. p. 367. *Ante*, 146.

(*w*) 1 East. P. C. c. 5. s. 114. p. 345.

(*x*) 2 Hale 182.

(*y*) 2 Hawk. P. C. c. 25. s. 73. 2 Hale 186.

(*z*) 1 East. P. C. c. 5. s. 107. p. 341.

to the circumstances of the case, be one of considerable length and particularity. (*a*) But it will be sufficient if the manner of the death proved agree in substance with that which is charged. Therefore if it appear that the party were killed by a different weapon from that described, it will maintain the indictment: as if a wound or bruise alleged to have been given with a sword be proved to have been given with a staff or axe; or a wound or bruise alleged to have been given with a wooden staff, be proved to have been given with a stone. So if the death be laid to have been by one sort of poisoning, and it turn out to have been by another, the difference will not be material. But if a person be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a species of death entirely different, as by shooting, starving, or strangling. (*b*) Where the manner of the death is doubtful, it will be proper to lay it differently in different counts, so as to meet the evidence. (*c*)

It seems to be necessary to aver *a striking* where the death has been occasioned by a wound, bruise, or other assault: and it appears to have been holden that an indictment, stating that the party of malice aforethought murdered, or gave a mortal wound, without saying that he *struck*, &c. was bad. (*d*) But this doctrine has been questioned, (*e*) though it is admitted to be most safe to use the term where it may seem to be required by the nature of the fact. (*f*) It seems also that if the death be occasioned by any instrument holden in the hand of the party killing at

(*a*) As in the case of Jackson and others, 9 St. Tri. 715. (ed. by Hargr.) where the indictment stated a murder by a long course of barbarous usage.

(*b*) 1 East. P. C. c. 5. s. 107. p. 341. 2 Hawk. P. C. c. 23. s. 84. 2 Hale 185, 186. 2 Inst. 319. Mackally's case, 9 Co. 67.

(*c*) As in Hindmarsh's case, 2 Leach 569.

(*d*) Long's case, 5 Co. 122. a. Dy. 99. 2 Hale 184. Lorkin's case, 1 Bulstr. 124.

(*e*) 2 Hawk. P. C. c. 23. s. 82. referring to Cro. Jac. 635. Sum. 207. Yelv. 28.

(*f*) 2 Hawk. P. C. *ibid.*

the time, it should be so alleged; and that regularly the instrument should be stated to be of a certain value, or of no value: but an able writer says that he could not find the grounds for the first of these averments, and that the latter does not seem to be essential. (*g*) But it ought to be stated in what part of the body the wound was given: (*h*) and the length and depth of it should in general be shewn. (*i*) It should however be observed as to this subject, that though it is necessary to state the manner and place of the hurt, and its nature, in order that the indictment may be good as to its formality, yet if it appear upon the evidence that the party died of another kind of wound, in another place, the indictment will nevertheless be maintained. (*k*) It is however necessary, in all cases, that the death by the means stated should be positively alleged, for it cannot be taken by implication: if, therefore, it is stated that the death was caused by any stroke, the indictment should proceed to aver that the prisoner thereby gave to the deceased a mortal wound or bruise whereof he died; (*l*) and an indictment, setting forth that the prisoner choaked the deceased, *quâ suffocatione obiit*, instead of *de quâ suffocatione*, &c. was adjudged to be erroneous. (*m*) And if the means of the death be alleged to be by poison, it should be averred, after stating particularly the manner in which the poison was administered, that the party died of the poison so taken, and the sickness thereby occasioned. (*n*) And an indictment, which stated the death to have been caused by means of ravishing an infant, but omitted to aver that a mortal wound or bruise was given, was holden to be defective. (*o*)

(*g*) 1 East. P. C. c. 5. s. 108. p. 341, 342.

(*h*) 2 Hale 185. 2 Hawk. P. C. c. 23. s. 80.

(*i*) 2 Hale 186. 2 Hawk. P. C. c. 23. s. 81.

(*k*) *Id. Ibid.*

(*l*) 2 Hale 186.

(*m*) 1 Roll. 137. 2 Hawk. P. C. c. 23. s. 83.

(*n*) 1 East. P. C. c. 5. s. 111. p. 343. 2 Hawk. P. C. c. 23. s. 82, 83.

(*o*) Lad's case, 1 Leach 96.

Averment of *malice aforethought*, statement of time, place, &c. and conclusion.

It is necessary to state, that the act by which the death was occasioned was done feloniously, and especially that it was done of *malice aforethought*, (*p*) which, as we have already seen, is the great characteristic of the crime of murder; (*q*) and it must also be stated, that the prisoner *murdered* the deceased. (*r*) If the averment respecting *malice aforethought* be omitted, and the indictment only allege that the stroke was given *feloniously*, or that the prisoner *murdered*, &c. or *killed*, or *slew* the deceased, the conviction can only be for manslaughter. (*s*) It is also necessary to allege the *time* and *place*, as well of the wound as of the death; so that where the party is indicted in the county where the death happened, under the statute 2 and 3 Edw. VI. c. 24. (*t*) the stroke should be alleged in the county where it really was; and by the same rule the offence must be alleged in the place where it was committed in indictments upon the statutes 28 Hen. VIII. c. 15. and 33 Hen. VIII. c. 23. (*u*) for murders upon the sea, or in other places therein mentioned. (*x*) And the respective times of the wound and death must be shewn, that it may appear that the deceased died within a year and a day from the stroke or other cause of death; but though the day or year be mistaken, it is not material, if it appear by the evidence that the death happened within the time limited, without which the law does not attribute the death to the stroke or poison. (*y*) The indictment is concluded, by charging the murder upon the party by way of consequence from the antecedent matter, in a positive allegation that the prisoner in manner and by the means aforesaid, feloniously, wilfully, and of his malice aforethought, did (poison,) kill, and murder. (*z*) And where the

(*p*) 2 Hale 186, 187. Staund. P. C. 130. Bradley *v.* Banks, Yelv. 205.

(*q*) *Ante*, 613 *et sequ.*

(*r*) 2 Hawk. P. C. c. 23. s. 77.

(*s*) 1 East. P. C. c. 5. s. 116. p. 345, 346. 2 Hale 186.

(*t*) *Ante*, 672.

(*u*) *Ante*, 673, 675.

(*x*) 1 East. P.C. c. 5. s. 112. p. 343.

(*y*) 2 Hawk. P. C. c. 23. s. 90. 2 Inst. 318. 1 East. P. C. c. 5. s. 112. p. 343.

(*z*) 1 East. P. C. c. 5. s. 117. p. 347.

stroke was at one time or place and the death at another, if the day be specially alleged, it should be that on which the party died, and not that on which he was stricken; for until he died it was no murder. (*a*)

Of the finding the bill of indictment by the grand jury.

Where the grand jury return the bill of indictment only a a true bill for manslaughter and *ignoramus* as to the murder, it is stated to have been the usual course to strike out, in the presence of the grand jury, the words "maliciously" and "of malice aforethought," and "murder," and to leave only so much as makes the bill to be one for manslaughter; (*b*) and this appears to be the practice at the present time upon some of the circuits: (*c*) but it has been thought to be the safer way, to present a new bill to the grand jury for manslaughter. (*d*) Though the same indictment may charge one with murder and another with manslaughter, yet if it charge both with murder, the grand jury cannot find it a true bill against one, and manslaughter as to the other; but a finding against one for murder will be good, and there ought to be a new bill against the other for manslaughter. (*e*)

Arraignment.

If, as is very commonly the case, there be an indictment for murder, and the coroner's inquisition for the same offence against the same person, at the same sessions of gaol delivery, the usual practice appears to be to arraign and try the prisoner upon both, in order to avoid the plea of auterfois acquit or attaint; and to indorse his acquittal or attainder upon both presentments. (*f*)

Of the evidence.

The evidence in cases of murder, will consist of the proof

(*a*) 1 East P. C. c. 5. s. 117. p. 347.

(*b*) 2 Hale 162.

(*c*) *Ex relat.* Mr. Pugh, Clerk of Assize on the *Oxford* circuit, 1816.

(*d*) By Lord Hale, (2 Hale 162.) on the ground that the words of the indorsement do not make the indictment, but only evidence the assent or dissent of the grand jury, and that the bill itself is the indictment when affirmed.

(*e*) 1 East. P. C. c. 5. s. 116. p. 347.

(*f*) 1 East. P. C. c. 5. s. 134. p. 371.

of the particular facts and circumstances which shew the killing as stated in the indictment, and that it was committed by the party accused of malice aforethought. It should be observed however, that when the fact of killing is proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily shewn by the prisoner, unless they arise out of the evidence produced against him; for the law presumes the fact to have been founded in malice until the contrary appears. (*g*)

Rule as to its being shewn that the body of the deceased has been found.

It has been holden as a rule, that no person should be convicted of murder unless the body of the deceased has been found: and a very great judge says, "I would never convict any person of murder or manslaughter, unless the fact "were proved to be done, or at least the body be found "dead." (*h*) But this rule, it seems, must be taken with some qualifications; and circumstances may be sufficiently strong to shew the fact of the murder, though the body has never been found. Thus, where the prisoner, a mariner, was indicted for the murder of his captain at sea, and a witness stated that the prisoner had proposed to kill the captain, and that the witness being afterwards alarmed in the night by a violent noise, went upon deck, and there observed the prisoner take the captain up and throw him overboard into the sea, and that he was not seen or heard of afterwards; and that near the place on the deck where the captain was seen a billet of wood was found, and that the deck and part of the prisoner's dress were stained with blood; the court, though they admitted the general rule of law, left it to the jury to say, upon the evidence, whether the deceased was not killed before his body was cast into the sea; and the jury being of that opinion, the prisoner was convicted, and (the conviction being unanimously approved of by the judges) was afterwards executed. (*i*)

(*g*) Fost. 255, *Ante*, 615, 616.

(*h*) 2 Hale 290.

(*i*) Hindmarsh's case, 2 Leach 571. It was urged on the prisoner's behalf at the trial by Garrow, (now Mr. Baron Garrow,) that he was en-

Proof of the averments in the indictment.

It is better not to put forth more of the special circumstances of the case, in an indictment for murder, than are required by the established rules; but if all the special matter in respect of which the law implies malice, be set forth, it is laid down that a variance between the indictment and the evidence is not material, provided the substance of the matter be found. (*i*) Upon this principle, where an indictment for the murder of a serjeant at mace of the city of London supposed that the sheriff of London, upon a plaint entered, made a precept to the serjeant at mace to arrest the defendant, and it appeared that there was not any such precept made, and that, by the custom of London, after the plaint entered, any serjeant, *ex officio*, at the request of the plaintiff, might arrest a defendant, *absque aliquo præcepto, ore tenus vel aliter*, it was holden that this statement of the precept was but circumstance not necessary to be supported in evidence, and that it was sufficient if the substance of the matter were proved without any precise regard to circumstance. (*k*) And if a *capias ad satisfaciendum, fieri facias*, writ of assistance, or any other writ of the like kind, issue directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. (*l*)

titled to be acquitted on the ground that it was not proved that the captain was dead, and that as there were many ships and vessels near the place where the transaction was alleged to have taken place, the probability was, that he was taken up by some of them, and was then alive. And the learned counsel mentioned a remarkable case which had happened before Mr. J. Gould. The mother and reputed father of a bastard child were observed to take the child to the margin of the dock at *Liverpool*, and, after stripping it, cast it into the dock. The body of the infant was not afterwards seen; and as the tide of the sea flowed and reflowed into and out of the dock, the learned judge, upon the trial of the father and mother for the murder of their child, observed that it was possible that the tide might have carried out the living infant; and upon this ground the jury, by his direction, acquitted the prisoners.

(*i*) 1 East. P. C. c. 5. s. 115. p. 345.

(*k*) Mackalley's case, 9 Co. 67.

(*l*) Fost. 311, 312.

In a case where the prisoner was charged with murder by poisoning, and the indictment stated that she *delivered* the poisoned food to the deceased, it was ruled that such allegation was proved, by shewing that the prisoner put the poison in some pudding meal, which was in a bowl in the milk house, from whence it was taken by the deceased, as usual, to make the pudding for the family, and afterwards eaten by her. (*m*)

Dying declarations of the party killed.

There is one important species of evidence occasionally resorted to in cases of homicide, namely, the dying declarations of the party killed, which will be considered in a future part of this treatise. (*n*)

Of the verdict.

The jury may, upon an indictment for murder, find the prisoner guilty of the offence charged, or of the lesser offences of manslaughter or excusable homicide. (*o*) Where, however, the facts of the case amount only to excusable homicide, it is usual for the judge, at the present day, to permit or direct a general verdict of acquittal, unless some considerable blame appears to attach to the conduct of the party. (*p*) And several persons present at a homicide may be guilty in different degrees, one of murder, the other only of manslaughter. So a wife or servant may be guilty of petit treason and a stranger of murder, being all present at the fact. (*q*)

Verdict of manslaughter when the offence was committed on the seas, and is tried by commission.

By the 39 Geo. III. c. 37. s. 2. any person tried for murder or manslaughter committed upon the sea, by virtue of any commission directed under the 28 Hen. VIII. c. 15. (*r*) and found guilty of manslaughter only, shall be entitled to the benefit of clergy in like manner and shall be subject to

(*m*) Nicholson's (Mary) case, 1 East. P. C. c. 5. s. 116. p. 346.

(*n*) *Post.* Book VII. upon *Evidence.*

(*o*) 1 Hale 449. 2 Hale 302. Co. Lit. 282, a.

(*p*) *Post.* Chap. on *Excusable Homicide.* Fost. 279, 289.

(*q*) 1 East. P. C. c. 5. s. 135. p. 371.

(*r*) *Ante*, 673.

the same punishment as if he had committed such manslaughter upon land. And by the 43 Geo. III. c. 113. s. 6. (*s*) in case any offender shall, in pursuance of that act, or the act of 33 Hen. VIII. c. 23. (*t*) be indicted for murder, and, upon the trial, shall appear to be guilty only of manslaughter, the jury may, on such indictment, find the party guilty of manslaughter only; or, in case of doubt or difficulty, may find a special verdict, upon which there shall be the like proceedings, judgment, &c. as if the offence had been committed within any county of the realm, and the trial had been had and verdict been found upon an indictment for murder, according to the course of the common law, by a jury of the county within which the offence was committed.

The jury should attend to the directions of the court.

In every case where the point turns upon the question whether the homicide was committed wilfully and maliciously, or under circumstances justifying, excusing, or alleviating, the matter of fact, namely, *whether the facts alleged by way of justification, excuse, or alleviation, are true*, is the proper and only province of the jury. But whether, upon a supposition of the truth of the facts, such homicide be justified, excused, or alleviated, must be submitted to the judgment of the court; for the construction which the law puts upon facts stated and agreed, or found by a jury, is in this, as in all other cases, undoubtedly the proper province of the court. In cases of doubt and real difficulty it is commonly recommended to the jury to state facts and circumstances in a *special verdict*. But where the law is clear, the jury, under the direction of the court in point of law, matters of fact being still left to their determination, may, and if they are well advised, always will, find a general verdict, conformably to such direction. (*u*)

Of the ver-

The statute 43 Geo. III. c. 58. which repeals the 21

(*s*) *Ante*, 676.
(*t*) *Ante*, 675.
(*u*) Fost. 255, 256.

dict, &c. where women tried for the murder of their bastard children are acquitted of the murder, and found guilty of concealing the birth.

Jac. I. c. 27. and the Irish act 6 Anne, (*w*) provides that the trials, in England and Ireland, of women charged with the murder of any issue of their bodies, which being born alive would by law be bastard, shall proceed by the like rules of evidence and presumption as are allowed to take place in respect to other trials for murder. And the statute further enacts, (*x*) "That it shall and may be lawful "for the jury, by whose verdict any prisoner charged with "such murder as aforesaid shall be acquitted, to find, in "case it shall so appear in evidence, that the prisoner was "delivered of issue of her body, male or female, which, if "born alive, would have been bastard; and that she did, "by secret burying, or otherwise, endeavour to conceal the "birth thereof; and thereupon it shall be lawful for the "court before which such prisoner shall have been tried "to adjudge that such prisoner shall be committed to the "common gaol, or house of correction, for any time not "exceeding two years."

As to the concealment.

By the repealed statute of 21 Jac. I. the concealment of the *death* of the bastard child by the mother made her guilty of a capital offence, unless she could prove that the child was born dead; and it may be useful to mention some of the points which have been holden respecting such concealment, as they may assist in the construction of the statute 43 Geo. III. as to the concealment of the birth of a bastard child. It has been holden, upon the statute 21 Jac. I. that if the mother called for help, or confessed herself with child, she was not within its construction: and, upon the same principle, evidence was always allowed of the mother's having made provision for the birth, as a circumstance to shew that she did not intend to conceal it. (*y*) The presence even of an accomplice was holden to take a case out of that statute: so that where a woman was indicted for the murder of her bastard child, and the mother

(*w*) *Ante*, 618.

(*x*) S. 4.

(*y*) 1 East. P. C. c. 5. s. 15. p. 228.

of the woman was indicted at the same time for being present aiding and abetting, and there was no other evidence of guilt but the concealment by both the prisoners, they were acquitted. (*z*) If from the view of the child it were testified by one witness, by apparent probabilities, that it had not arrived at its *debitum partûs tempus*, as if it wanted hair or nails, the case was considered as not being within that statute, on account of there being presumptive evidence that the child was born dead; but under such circumstances it was left to the jury upon the evidence, as at common law, to say whether the mother was guilty of the death. (*a*) Probably it would be holden upon the 43 Geo. III. c. 58. that if the child were so far from its *debitum partûs tempus*, that it could not have been born alive, and that it was not therefore a being upon which the crime of murder could have been committed, the jury would not be authorized to find the mother guilty of an endeavour to conceal the birth; on the ground that the act does not contemplate that sort of delivery, usually called a *miscarriage*, which takes place before a woman can, according to the known rules of parturition, be delivered of a live child. (*b*)

(*z*) Peat's case, *Exeter* Sum. Ass. 1793, *cor.* Heath, J. 1 East. P. C. c. 5. s. 15. p. 229.

(*a*) 2 Hale 289.

(*b*) This statute only empowers a jury to find the prisoner guilty of the concealment of the birth of a bastard child, when she is tried upon an indictment for the *murder* of such child, and does not make the concealment an offence for which an indictment can be preferred. In consequence much difference of opinion and practice is stated to have prevailed amongst the gentlemen serving upon the grand juries of the country, upon the question whether, when there clearly is no case upon which the prisoner ought to be put upon her trial for murder, but some evidence of a concealment, it is proper to find the bill for murder, in order that the prisoner may be tried for the concealment: and it certainly does seem to be a painful and severe proceeding, when there is clearly nothing but a concealment of the birth, to send a mother to the bar, to answer to the dreadful accusation of having murdered her own offspring. The statute 49 Geo. III. c. 14. which repeals the *Scotch* act of parliament, relating to the murder of bastard children (*ante*, 618, note (*o*) differs from the 43 Geo. III. c. 58. and does not make the concealment a matter

Whether the prisoner be charged with the murder of her bastard child by the coroner's inquisition, or by a bill of indictment returned by the grand jury, she may be found guilty under this statute of the 43 Geo. III. of endeavouring to conceal the birth. (*c*)

SECTION VII.

OF JUDGMENT AND EXECUTION.

THE judgment in cases of murder is regulated by the statute 25 Geo. II. c. 37. which, reciting that this horrid crime had been of late more frequently perpetrated than formerly, was passed in order to add some further terror and peculiar marks of infamy to the punishment of death.

Time of execution.

By section 1. of this statute it is enacted, that "all persons who shall be found guilty of wilful murder, be executed according to law on the day next but one after sentence passed, unless the same shall happen to be *Sunday*, and in that case on the *Monday* following."

Disposal of the bodies of murderers.

The second section enacts, "That the body of such murderer so convicted shall, if such conviction and execution shall be in the county of *Middlesex*, or within the city of *London*, or the liberties thereof, be immediately conveyed by the sheriff or sheriffs, his or their deputy or deputies,

which can only be found by the jury upon the trial of an indictment for murder, but enacts (s. 2.) "that if any woman in *Scotland* "shall conceal her being with "child during the whole period "of her pregnancy, and shall not "call for and make use of help or "assistance in the birth, and if the "child be found dead or be amiss-"ing, the mother, being lawfully "convicted thereof, shall be impri-"soned for a period not exceeding "two years, in such common gaol "or prison as the court before "which she is tried shall direct and "appoint."

(*c*) Cole's case, 3 Campb. 371. 2 Leach 1095.

" and his or their officers, to the hall of the surgeon's com-
" pany, or such other place as the said company shall ap-
" point for this purpose, and be delivered to such person
" as the said company shall depute or appoint, who shall
" give to the sheriff or sheriffs, his or their deputy or de-
" puties, a receipt for the same; and the body so delivered
" to the said company of surgeons shall be dissected and
" anatomized by the said surgeons, or such person as they
" shall appoint for that purpose: and in case such convic-
" tion and execution shall happen to be in any other coun-
" ty, or other place in Great Britain, then the judge or
" justice of assize, or other proper judge, shall award the
" sentence to be put in execution the next day but one after
" such conviction (except as is before excepted); and the
" body of such murderer shall, in like manner, be delivered
" by the sheriff, or his deputy and his officers, to such sur-
" geon as such judge or justice shall direct for the purpose
" aforesaid."

Sentence to be pronounced immediately.

The third section enacts, " That sentence shall be pro-
" nounced in open court immediately after the conviction
" of such murderer, and before the court shall proceed to
" any other business, unless the court shall see reasonable
" cause for postponing the same; in which sentence shall
" be expressed not only the usual judgment of death, but
" also the time appointed hereby for the execution thereof,
" and the marks of infamy hereby directed for such offenders,
" in order to impress a just horror in the mind of the of-
" fender, and on the minds of such as shall be present, of
" the heinous crime of murder."

The bodies of murderers may be hung in chains; but may not be buried unless after dissection.

By the fifth section, it is provided, " That it shall be in the
" power of any such judge or justice, to appoint the body
" of any such criminal to be hung in chains: but that in no
" case whatsoever, the body of any murderer shall be suf-
" fered to be buried, unless after such body shall have been
" dissected and anatomized as aforesaid; and every such

"judge or justice shall and is hereby required to direct the "same either to be disposed of as aforesaid, to be anatomized, "or to be hung in chains, in the same manner as is now "practised for the most atrocious offences."

Form of the sentence.

It appears, that the form of the sentence or judgment to be pronounced, in conformity to the provisions of this statute, was made the subject of conference at a meeting of the judges (*d*), and that the following form was agreed upon:

"*That you be taken from hence to the prison from whence "you came, and that you be taken from thence on the "day of instant (or next) to the place of execution, "and that you be there hanged by the neck, till your body be "dead; and that your body, when dead, be taken down, and be "dissected and anatomized.*"

There was some doubt whether either judgment of dissection or hanging in chains might not be given; and, if the first were pronounced, whether, if no surgeon would take the body, it might not be hung in chains: but, on debate, it was agreed by nine judges, that, in all cases within the act, the judgment for dissecting and anatomizing *only* should be part of the judgment pronounced; and that, if it were thought adviseable, the judge might afterwards direct the hanging in chains by special order to the sheriff, pursuant to the proviso for that purpose in the statute (*e*)

The stat. 25 G. II. c. 37. extends to peers.

It has been decided by the house of peers, that *a peer*, convicted of murder, ought to receive judgment according to the provisions of this statute: and it was also decided in the same case that, supposing the day appointed by the judgment for execution should lapse before such execution done

(*d*) Swan and Jefferys, (case of) 1 East. P. C. c. 5. s. 136. p. 373. citing Serj. Forster's MS. Ex relatione Clive, J. Fost. C. L.

(*e*) Fost. 107, 1 East. P. C. c. 5. s. 136. p. 374. where it is stated, that such is the practice.

(which, however, the law will not presume), a new time may be appointed for the execution either by the high court of parliament, before which such peer shall have been attainted, or by the court of King's Bench, the parliament not then sitting, the record of the attainder being properly removed into that court (*f*).

Execution may be stayed.

By the fourth section of the statute, it is enacted, that after sentence pronounced, "in case there shall appear reasonable "cause, it shall and may be lawful, to and for such judge or "justice before whom such criminal shall have been so tried, "to stay the execution of the sentence, at the discretion of "such judge or justice, regard being always had to the true "intent and purpose of this act."

Treatment of murderers after conviction.

By the sixth, seventh, and eighth sections, certain regulations are given, for the treatment of a murderer, after conviction. It is enacted, that such criminal shall be confined in a separate cell, and that no person but the gaoler or his servants shall have access to him, without licence under the hand of the judge or sheriff: and that he shall, between sentence and execution, be fed with bread and water only (except on receiving the sacrament, or in case of necessaries administered medicinally by a professional man), under a penalty upon the gaoler of £20, and imprisonment till it be paid, and forfeiture of his office. But in case the judge or justice shall see cause to respite the execution, he may relax any or all of these restraints, by licence in writing, signed by him (*g*).

Sentence after removal of the indictment to the King's Bench by certiorari.

Where two persons had been convicted of a barbarous murder in *Pembrokeshire* at the *Hereford* assizes, being the next English county, and the indictment had been removed by certiorari into the court of King's Bench, in order to argue some exceptions which were overruled, that court de-

(*f*) Earl Ferrer's case, Fot. 138. 139. 1 East. P.C. c. 5. s. 136. p. 374.

(*g*) s. 7.

cided, after some question made whether the prisoners ought not to be sent back to Herefordshire to receive sentence, that they had the same jurisdiction over facts committed in *Wales*, as if committed in the next adjacent county in England; and the prisoners were therefore sentenced in the King's Bench, and were executed by the marshal (*h*). But it seems to have been considered in a late case, that sentence pursuant to the statute, 25 Geo. II. c. 37. may be passed by a judge at *nisi prius* upon an indictment for murder, removed by certiorari into the court of King's Bench, and afterwards tried at *nisi prius*, without remitting the transcript of the record to the court of King's Bench (*i*).

(*h*) Athos case (father and son) as cited in note (*r*). 1 Hale 463. where it is said, that the prisoners were executed at Kennington gallows, near Southwark. In Taylor's case, 5 Burr. 2797. the reporter says, that he remembers this case, and that the defendants, being in the custody of the marshal, were executed at *St. Thomas a Waterings*, near the end of Kent Street. And see also the case in 1 Str. 553. and 8 Mod. 136. and see Sissinghurst house case, *ante*, 658. note (*w*).

(*i*) Rex *v.* Thomas, 4 M. and S. 447.

CHAPTER THE SECOND.

Of Petit Treason.

PETIT Treason is a breach of the lower allegiance of private and domestic faith; and considered as proceeding from the same principle of treachery in private life as would have led the person, harbouring it, to have conspired in public against his liege lord and sovereign. At common law the instances of this kind of crime were more numerous than they are at present, and involved in some uncertainty:(*a*) but, by the statute 25 Edw. III. st. 5. c. 2. they were reduced to the following cases: 1. Where a servant kills his master. 2. Where a wife kills her husband. 3. Where an ecclesiastical person, secular or regular, kills his superior, to whom he owes faith and obedience.

Principles relating to wilful murder, are applicable to petit treason.

The principles which have been laid down, with respect to wilful murder, are also applicable to the crime of petit treason, which, though it appears to have been sometimes regarded differently, (*b*) is substantially the same offence as murder, differing only in degree. (*c*) It is murder aggravated by the circumstance of the allegiance, however low, which the murderer owed to the deceased; and in consequence of that circumstance of aggravation, and of that alone, the judgment upon a conviction is more grievous in one case than in the other; though in common practice no

(*a*) 1 Hale 376.

(*b*) By unwary people, as Mr. J. Foster says. Fost. 323.

(*c*) Fost. 323, 327, 336. 4 Blac. Com. 203.

material difference is made in the manner of the execution.(*d*) Accordingly, a person guilty of petit treason may be indicted for murder: (*e*) and a wife or servant joining with a stranger in the murder of the husband or master, may be charged in one indictment (which could not be if their offences were not substantially the same); and such indictment concluding that they "feloniously, traitorously, and of malice aforethought, murdered," is good for both, *reddendo singula singulis.* (*f*) But, though the indictment may be for murder only, it is considered as most proper to prefer an indictment for petit treason, because the judgment is different, and because a person indicted for petit treason is entitled to a peremptory challenge of thirty-five. (*g*) And this doctrine was acted upon by a very learned judge, in a case of late occurrence. The prisoner was arraigned on the last day of the assizes, and after the grand jury had been discharged,

(*d*) Fost. 323. And now by 30 G. III. c. 48. in all cases of conviction of any woman for high or petit treason, the judgment shall be that she shall be drawn and hanged, and not burned; and any woman convicted of petit treason is made liable to such further pains and penalties as are declared by 25 G. II. c. 37. with respect to persons convicted of wilful murder.

(*e*) 1 Hale 378. Fost. 325, *et sequ.* There is a case *contrà* cited in Coke v. Woodburn, 6 St. Tr. 224. but Mr. J. Foster gives good reasons for the conclusion, that no such case ever existed, Fost. 326.

(*f*) Fost. 329. Swan's case, Fost. 105. Dalis. 16.

(*g*) Swan's case, Fost. 104, *et sequ.* And see Fost. 328, where the learned author says, that in cases where, upon any indictment for murder, it should come out in evidence, that the crime amounted to petit treason, he should make no sort of difficulty of discharging the jury of the indictment for murder, and ordering a fresh indictment for petit treason: and that he thought it by no means advisable to direct the jury to give a verdict of acquittal, as a person charged with a crime of so heinous a nature ought not to have the chance given him by the court of availing himself of the plea of *auterfois acquit.* And in Fost. 329. it is laid down that *auterfois acquit* or *attaint* upon an indictment for murder is a good bar to an indictment for petit treason for the same fact, and so *è converso.* See also 2 Hale 246, 252. 3 Inst. 213. It may be observed as to the challenge of thirty-five, that it was restored by 1 & 2 Ph. & M. c. 10.

upon an indictment charging her with the wilful murder of her sister; when Lawrence, J. upon reading the depositions taken before the coroner, found that she had acted as a servant in her sister's family; upon which, after conferring with the counsel for the prosecution, and citing the authority of Foster, J. (*h*) he refused to try her upon that indictment, and ordered her to be detained in prison; and that an indictment for petit treason should be preferred against her at the next assizes. (*i*)

A prisoner indicted for petit treason, may be found guilty of murder, and acquitted of the treason.

Upon an indictment for petit treason, if the killing of the deceased with malice be proved, but not the relation between the parties;(*k*) or if the fact can only be proved by one witness, or by the examination of the deceased before a magistrate, by virtue of the statutes of Philip and Mary, the prisoner may be found guilty of murder, and acquitted of the treason: (*l*) and upon such an indictment the prisoner may be acquitted of the treason, and found guilty of manslaughter (*m*).

Servant killing master or mistress.

The statute of the 25 Edw. III. has been construed so strictly that no case which could not be brought within the meaning of the words, however heinous in its nature, has been expounded to be within the equity of them; and, therefore, it has been held that the murder of a father by a son shall not be punished as petit treason, unless the son may by a reasonable construction come under the word *servant*. But, if he be bound apprentice to his father or mother, or is maintained by them, or does for them any necessary service, though he do not receive wages, he may be indicted by the

(*h*) *Ante*, note (*g*).

(*i*) Edwards's (Penelope) case, cor. Lawrence, J. *Stafford* Ass. MS.

(*k*) 1 Hale 378. 2 Hale 184, 292. Fost. 328.

(*l*) Radbourne's case, 1 Leach 457. And see 1 Hale 305. 2 Hale 284. Fost. 328. The statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10. extend only to felonies.

(*m*) 1 Hale 378.

description of servant (*n*); and a near relation, as a *sister*, may be a servant within the meaning of the statute, if she acts as such in the family.(*o*) The murder of a mistress, or of a master's wife, has been adjudged petit treason within the statute, on the ground of those persons being within the meaning of the word *master*, which is used to signify any person to whom another stands related as servant (*p*). And the murder of a person by one who was his servant, upon malice conceived during the service, though it be not within the express words of the statute, is within their meaning; for it is but the execution of the treasonable intention of the party conceived while he was a servant (*q*).

Wife killing her husband.

A wife, though divorced *a mensâ et thoro*, is still within the statute, because the *vinculum matrimonii* subsists; but otherwise, if there be a divorce *causâ consanguinitatis*, or *præcontractûs;* for then the vinculum is dissolved.(*r*) A wife de facto is not sufficient; and therefore if A. be married to B., and during that intermarriage marry C., the second marriage being merely void, C. is not a wife within this law; though perhaps she might, under circumstances, be considered as a servant, if she cohabit with A., and he finds her necessaries for her subsistence. (*s*) But a husband cannot be guilty of petit treason by killing his wife, for there is no reciprocity of obedience and subjection (*t*).

Clergyman killing his superior.

A clergyman is understood to owe canonical obedience to the bishop who ordained him, to him in whose diocese he is beneficed, and also to the metropolitan of such suffragan or

(*n*) 1 Hawk. P. C. c. 32. s. 2. 1 East. P. C. c. 5. s. 99. p. 336. At common law, the son would have been guilty of petit treason, though not a servant. 1 Hale 380.

(*o*) Edwards's case, *ante*, note (*i*).

(*p*) 1 Hale 380. 1 Hawk. P. C. c. 32. s. 3.

(*q*) 1 Hawk. P. C. c. 32. s. 4. 1 Hale 380. 1 East. P. C. c. 5. s. 99. p. 336.

(*r*) 1 Hale 380. 1 Hawk. P. C. c. 32. s. 9. 4 Blac. Com. 203.

(*s*) 1 Hale 380. But the learned writer adds *tamen quære.*

(*t*) 1 Hawk. P. C. c. 32. s. 9.

diocesan bishop; and, therefore, to kill any of these is petit treason. And if he have livings in two dioceses, the bishops of both are his immediate ordinaries; for he swears obedience to both (*u*).

Of principals and accessories.

If a wife or servant procure a stranger to kill the husband or master, in the absence of such wife or servant, neither the procurer nor actor are guilty of petit treason, but only of murder; as it is an allowed maxim that the offence of an accessory can never be of a higher kind than that of the principal. But, if the wife or servant be either actually present when the crime is committed, or present only in the judgment of the law by being in the same house, though not in the same room, such wife or servant will be deemed principals equally with the stranger, and they will be guilty of petit treason, and the stranger of murder (*w*). If a wife procure a servant to kill the husband, she being absent, it will be petit treason in the servant, and the wife will be an accessary (*x*): and it seems, that if a stranger procure a wife or servant to kill the husband or master, such stranger may be indicted as an accessory to petit treason (*y*).

If a servant and a stranger, or if a wife and a stranger, conspire to rob the husband or master, and the servant or wife be present when the master happens to be killed in prosecution of the original design, the wife or servant will be guilty of petit treason (*z*). And if a wife or servant intending to poison or kill a stranger, the wife by mistake poison or kill her husband, or the servant his master, this, which would have been murder if it had taken effect against the stranger, becomes petit treason in the death of the husband or master. (*a*)

(*u*) 4 Blac. Com. 203. 1 East. P. C. c. 5. s. 101. p. 338. 1 Hale 381. 1 Hawk. P. C. c. 32. s. 10.

(*w*) 1 Hawk. P. C. c. 32. s. 7. 1 Hale 378, 379.

(*x*) 1 Hawk. P. C. c. 32. s. 8. 1 East. P. C. c. 5. s. 102. p. 338.

(*y*) 1 Hawk. P. C. c. 32. s. 8.

(*z*) 1 Hale 379. (Dy. 128, a.) 1 East. P. C. c. 5. s. 102. p. 338.

(*a*) 1 Hale 379. Plowd. Com. 475, b.

The same rule holds throughout, mutatis mutandis, for an inferior clergyman in relation to his superior (*b*).

Of the judgment and execution.

The judgment in petit treason is, that the criminal be drawn (on a hurdle), and hanged until dead (*c*). It was formerly different in the case of women, who were adjudged to be drawn and burned: but this was altered by the statute 30 G. III. c. 48. by which they are subjected to the same judgment in all respects as men, and particularly with respect to the provisions of the statute 25 G. II. c. 37. And it has been resolved by the judges that the judgment for dissecting and anatomizing, and touching the time of execution, ought to be pronounced in cases of petit treason, though murder only is mentioned in the statute, and in that case too that the time of execution should be part of the judgment (*d*).

(*b*) 1 East. P. C. c. 5. s. 102. p. 338.

(*c*) The sentence in high treason is made similar to this by a late statute, 54 G. III. c. 146. with the addition that afterwards the head shall be severed from the body, and the body be divided into four quarters.

(*d*) 1 East. P. C. c. 5. s. 136. p. 372, and the case of Swan and Jefferys, *id.* p. 373.

CHAPTER THE THIRD.

Of Manslaughter.

IN this species of homicide, malice, which has been shewn(*a*) is the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution (*b*). The punishment appointed for it is proportionably lenient; as (with the exception only of one sort of manslaughter, which by the stat. 1 Jac. I. c. 8. commonly called the statute of stabbing, is made a capital crime,) the offender is admitted to the benefit of clergy.

Of aiders and abettors, and of accessories.

In order to make an abettor to a manslaughter a principal in the felony, he must be present aiding and abetting the fact committed. (*c*) But there cannot be any accessories before the fact in manslaughter, because it is presumed to be altogether sudden, and without premeditation. (*d*) Thus, if the indictment be for murder against A. and that B. and C. were counselling and abetting as accessories before only, (and not as *present* aiding and abetting, for such are principals,) if A. be found guilty only of manslaughter, and acquitted of murder, the accessories before will be thereby

(*a*) *Ante*, 613, *et sequ.*

(*b*) Fost. 290. 1. Hale 466.

(*c*) 1 Hale 438, 439, and see *ante*, 627, *et sequ.* as to what will be a presence, aiding and abetting.

(*d*) 1 Hale 437. 1 Hawk. P. C. c. 30. s. 2.

discharged (*e*) There may, however, be accessories after the fact in manslaughter. (*f*)

The several instances of manslaughter may be considered in the following order:—

I. Cases of provocation.

II. Cases within the statute of stabbing, 1 Jac. I. c. 8.

III. Cases of mutual combat.

IV. Cases of resistance to officers of justice, to persons acting in their aid, and to private persons lawfully interfering to apprehend felons, or to prevent a breach of the peace.

V. Cases where the killing takes place in the prosecution of some other criminal, unlawful, or wanton act.

VI. Cases where the killing takes place in consequence of some lawful act being criminally or improperly performed, or of some act performed without lawful authority.

SECTION I.

CASES OF PROVOCATION.

Whenever death ensues from sudden transport of passion, or heat of blood upon a reasonable provocation, and without malice, it is considered as solely imputable to human infirmity; and the offence will be manslaughter (*g*). It should

(*e*) 1 Hale 437. 450.

(*f*) 1 Hale 450. 1 East. P. C. c. 5. s. 123. p. 353. This seems to have been doubted before the statute 1 Ann. stat. 2. c. 9. s. 1. (2 Hawk. P. C. c. 29. s. 24): but the effect of that statute seems to have removed the doubt.

(*g*) 1 Hale 466. 1 Hawk. P. C. c. 30. Fost. 290. 4 Blac. Com. 191. 1 East. P. C. c. 5. s. 19. p. 232.

be remembered that the person sheltering himself under this plea of provocation must make out the circumstances of alleviation to the satisfaction of the court and jury, unless they arise out of the evidence produced against him; as the presumption of law deems all homicide to be malicious, until the contrary is proved (*h*).

Words of provocation.

It has been shewn that the most grievous *words* of reproach, contemptuous and insulting actions or gestures, or trespasses against lands or goods, will not free the party killing from the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or to do some great bodily harm, was otherwise manifested (*i*). But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be only manslaughter (*k*).

It is, indeed, said to have been held in one case that words of *menace of bodily harm* are a sufficient provocation to reduce the offence of killing to manslaughter (*l*); but it has been considered that such words ought, at least, to be accompanied by some act denoting an immediate intention of following them up by an actual assault (*m*).

But, though words of slighting, disdain, or contumely, will not of themselves make such a provocation as to lessen the crime into manslaughter; yet, it seems that if A. give indecent language to B., and B. thereupon strike A., but not mortally, and then A. strike B. again, and then B. kill A., that this is but manslaughter. The stroke by A. was

(*h*) *Ante*, 615.

(*i*) *Ante*, 632.

(*k*) Fost. 291. 1 East. P. C. c. 5. s. 20. p. 233.

(*l*) Lord Morley's case, 1 Hale 455. The same case is mentioned in Kel. 55; but no such position is there stated.

(*m*) 1 East. P. C. c. 5. s. 20. p. 233.

deemed a new provocation, and the conflict a sudden falling out; and on those grounds the killing was considered as only manslaughter (*n*).

Provocation by assault.

Where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation (*o*). So if A. be passing along the street, and B. meeting him (there being convenient distance between A. and the wall) take the wall of him and justle him, and thereupon A. kill B. it is said that such justling would amount to a provocation, which would make the killing only manslaughter. And again it appears to have been considered that where A. riding on the road, B. whipped the horse of A. out of the track, and then A. alighted and killed B., it was only manslaughter (*p*).

But, in the two last cases, it should seem that the first aggression must have been accompanied with circumstances of great violence or insolence; for it is not every trivial provocation which, in point of law, amounts to an assault, that will of course reduce the crime of the party killing to manslaughter. Even a blow will not be considered as sufficient provocation to extenuate in cases where the revenge is disproportioned to the injury, and outrageous and barbarous in its nature; but, where the blow which gave the provocation has been so violent as reasonably to have caused a sudden transport of passion and heat of blood, the killing which ensued has been regarded as the consequence of human infirmity,

(*n*) 1 Hale 455, where it is said, that this was held to be manslaughter, according to the proverb, "the second blow makes the affray;" and Lord Hale says, that this was the opinion of himself and some others.

(*o*) Kel. 135. 4 Blac. Com. 191. 1 East. P. C. c. 5. s. 20. p. 233.

(*p*) 1 Hale 455. Lanure's case.

and entitled to lenient consideration. Thus, where a woman, after some words of abuse on both sides, gave a soldier a box on the ear, which the soldier returned, by striking her on her breast with the pommel of his sword; and the woman then running away, the soldier pursued, and stabbed her in the back with his sword; Holt, C. J. at first considered it to be murder: but, upon its coming out in the progress of the trial, that the woman had struck the soldier with a patten on the face with great force, so that the blood flowed, it was holden clearly to be no more than manslaughter (*q*). In this case, the smart of the soldier's wound, and the effusion of blood, might possibly have kept his indignation boiling to the moment of the fact (*r*).

Provocation by restraining a person of his liberty.

Where a man has been injuriously restrained of his liberty, the provocation has been considered sufficient to extenuate; as where a creditor placed a man at the chamber door of his debtor, with a sword undrawn, to prevent him from escaping, while a bailiff was sent for to arrest him: and the debtor stabbed the creditor, who was discoursing with him in the chamber (*s*). And the same doctrine was held in a case, where a serjeant had put a common soldier under an arrest, who thereupon killed the serjeant with a sword; and upon the trial, no authority was shewn in the serjeant to make such arrest, the articles of war not being produced, nor any evidence given of the usage of the army. (*t*).

Provocation

Where a man finds another in the act of adultery with his

(*q*) Stedman's case, Old Bailey. Apr. 1704, MS. Tracy and Denton, 57 Fost. 292. 1 East. P. C. c. 5. s. 21. p. 234.

(*r*) Fost. 292. See the case more fully stated *ante*, 634.

(*s*) Buckner's case, Sty. 467.

(*t*) Wither's case, *Stafford* Sum. Assiz. 1784, cor. Buller, J. afterwards before all the judges in M. T. 25 G. III. MS. Gould and Buller cited. 1 East. P. C. c. 5. s. 20. p. 233. This case is also cited as to a point of evidence in Holt's case, 2 Leach, 594.

by detecting an adulterer.

wife, and kills him in the first transport of passion, he is only guilty of manslaughter, and that in the lowest degree (*u*): for the provocation is grievous, such as the law reasonably concludes cannot be borne in the first transport of passion. But it has been already shewn, that the killing of an adulterer deliberately, and upon revenge, would be murder (*w*).

Provocations of a slight kind, which have been allowed to extenuate, where the party killing has not acted with cruelty, or used dangerous instruments.

There are instances, where slight provocations have been considered as extenuating the guilt of homicide, upon the ground, that the conduct of the party killing upon such provocations might fairly be attributed to an intention to chastise, rather than to a cruel and implacable malice. But, in cases of this kind, it must appear, that the punishment was not urged with brutal violence, nor greatly disproportionate to the offence; and the instrument must not be such as, from its nature, was likely to endanger life (*x*). Thus, where A. finding a trespasser on his land, in the first transport of his passion, beat him, and unluckily happened to kill him, it was holden to be manslaughter: but it must be understood, that he beat him not with a mischievous intention, but merely to chastise for the trespass, and to deter him from committing it again (*y*). And of the case of the keeper of a park, who, finding a boy stealing wood in his master's ground, tied him to a horse's tail, and beat him, upon which the horse running away, the boy was killed (*z*), it is said, that if the chastisement had been more moderate, it had been but manslaughter; for, between persons nearly connected together by civil and natural ties, the law admits the force of a provocation done to one to be felt by the other (*a*). And, à fortiori, if the master had himself caught the trespasser, and beat him in such a manner as shewed a desire

(*u*) Manning's case, T. Raym. 212. 1 Ventr. 159. And the court directed the burning in the hand to be inflicted gently, because there could not be a greater provocation.

(*w*) *Ante*, 643.

(*x*) Fost. 291. 4 Blac. Com. 200.

(*y*) Fost. 291. 1 Hale 473. *ante*, 639.

(*z*) Halloway's case, Cro. Car. 131. 1 Hale 453. 1 Hawk. P. C. c. 31. s. 42. Fost. 292, *ante*, 639.

(*a*) 1 East. P.C. c. 5. s. 22. p. 237.

only to chastise and prevent a repetition of the offence, but had unfortunately, and against his intent, killed him, it would only have been manslaughter (*b*).

Ducking a pickpocket.

Where a person, whose pocket had been picked, encouraged by a concourse of people, threw the pickpocket into an adjoining pond, in order to avenge the theft, by ducking him, but without any apparent intention to take away his life, and the pickpocket was drowned, it was ruled to be only manslaughter; for though this mode of punishment is highly unjustifiable and illegal, yet the law respects the infirmities and imbecillities of human nature, where certain provocations are given (*c*).

Father taking up the quarrel of his son.

In a case where the prisoner's son having fought with another boy and been beaten ran home to his father all bloody, and the father presently took a cudgel, ran three quarters of a mile, and struck the other boy upon the head, upon which he died; it was ruled to be manslaughter, because done in sudden heat and passion (*d*); but the true grounds of the judgment seem to have been that the accident happened by a single stroke given in heat of blood, with a cudgel, not likely to destroy, and that death did not immediately ensue (*e*).

Nature of the instrument used by the party killing.

Several other cases are reported, in which the nature of the instrument used led to a lenient consideration of the homicide, on the ground that such instrument was not likely to endanger life. Thus, where a man, who was sitting drinking in an alehouse, being called by a woman "a son of a whore," took up a broomstaff, and threw it at her from a distance, and killed her; the judges were not unanimous, and a pardon was advised: and the doubt appears to have

(*b*) 1 East. P. C. c. 5. s. 22. p. 237.

(*c*) Fray's case, Old Bailey, 1785. 1 Hawk. P. C. c. 31. s. 38. 1 East. P. C. c. 5. s. 22. p. 236.

(*d*) Rowley's case, 12 Rep. 87. 1 Hale 453.

(*e*) Fost. 294, 295. Cro. Jac. 296. Godb. 182. See the case *ante*, 637, 638.

arisen upon the ground that the instrument was not such as could probably, at the given distance, have occasioned death, or great bodily harm (*f*). A similar doubt appears to have been entertained in the following case, which was stated in a special verdict. A mother-in-law employed her daughter-in-law, a child of ten years old, to reel some yarn; and finding some of the skains knotted, threw a four-legged stool at the child, which struck her on the right side of the head, on the temple, and caused her death soon afterwards: the verdict stated, that the stool was of a sufficient size and weight to give a mortal blow; but that the mother-in-law did not intend, at the time she threw the stool, to kill the child (*g*). And in a case, where the prisoner had struck his boy with one of his clogs, because he had not cleaned them, it was held to be only manslaughter, because the master could not, from the size of the instrument he had made use of, have had any intention to take away the boy's life (*h*).

In a case where the prisoner, who was a butcher, had employed a boy to tend some sheep, which were penned, who negligently suffered some of the sheep to escape through the hurdles, upon which the prisoner, seeing the sheep get through, ran towards the boy, and taking up a stake that was lying on the ground, threw it at him, and with it hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died; Nares, J. told the jury, to consider whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was, or was not, under the circumstances, and in the particular situation, an improper instrument for the purpose of correcting the negligence of the boy. And that, if they thought the stake was an improper instrument, they should

(*f*) 1 Hale 455, 456. 1 East. P. C. c. 5. s. 22. p. 236.

(*g*) Hazel's case, 1 Leach 368. The question whether this was murder or manslaughter was considered as of great difficulty, and no opinion was ever delivered by the judges.

(*h*) Turner's case, Comb. 407, 408, and cited in 1 Ld. Raym. 142, 144. 2 Ld. Raym. 1498. The clog was a small one; and Holt, C. J. said, that it was an unlikely thing to kill the boy.

further consider, whether it was probable that it was used with an intent to kill: if they thought it was, that they must find the prisoner guilty of murder; but on the contrary, if they were persuaded that it was not done with an intent to kill, that the crime would then amount, at most, to manslaughter. The jury found it manslaughter (*i*).

It has been before shewn, that the plea of provocation will not avail in any case, where it appears, that the provocation was sought for and induced by the act of the party, in order to afford him a pretence for wreaking his malice (*k*); and that even, where there may have been previous struggling or blows, such plea cannot be admitted, where there is evidence of express malice (*l*). It has also been observed, that in every case of homicide upon provocation, how great soever that provocation may have been, if there were sufficient time for passion to subside, and reason to interpose, such homicide will be murder (*m*): and it should always be remembered, that where a party relies upon the plea of provocation, it must appear that, when he did the fact, he acted upon such provocation, and not upon any old grudge (*n*).

SECTION II.

CASES WITHIN THE STATUTE OF STABBING.—1 JAC. I. c. 8.

By this statute, "every person and persons, who shall stab "or thrust any person or persons, that hath not then any "weapon drawn, or that hath not then first stricken the "party which shall so stab or thrust, so as the person or per- 1 Jac. I. c. 8. s. 2.

(*i*) Wiggs's case, reported in a note to Hazel's case, 1 Leach 378. If, however, the instrument used is so improper, as manifestly to endanger life, it seems that the intention of the party to kill will be implied from that circumstance. *Ante*, 638, 639, 670.

(*k*) *Ante*, 642.

(*l*) *Ante*, 639, 640, 641.

(*m*) *Ante*, 642. Fost. 296.

(*n*) 1 Hale 451. 1 East. P. C. c. 5. s. 23 b. p. 239. See Mason's case, *ante*, 640, 641, 642.

"sons so stabbed or thrust, shall thereof die within six "months then next following, although it cannot be proved "that the same was done of malice aforethought; yet "the party so offending, and being thereof convicted by ver- "dict, confession, or otherwise, according to law, shall be "excluded from the benefit of clergy, and suffer death, as in "case of wilful murder." There is a proviso that the act shall not extend "to cases of self-defence, misfortune, or "in any other manner than as aforesaid; nor to any person, "who shall commit manslaughter, in preserving the peace, "or chastising or correcting his child or servant."

Lenient construction of the statute.

This statute was made on account of the frequent quarrels, and stabbings with short daggers, between the Scotch and the English, at the accession of James the first; and as it was intended to meet a temporary evil, it would perhaps have been better if it had expired with the mischief it was meant to remedy (*o*). It has been considered as a rigorous statute, of doubtful expediency (*p*); and, accordingly, construed, by the benignity of the law, so favourably in behalf of the subject, and so strictly when against him, that the offence of stabbing is left by this statute almost upon the same footing as it stood at common law (*q*). Indeed, it was agreed by the judges, in Lord Morley's case, that the statute

(*o*) 4 Blac. Com. 193. 1 Ld. Raym. 140. It was continued by 16 Car. I. c. 4. till some other act shall be made, touching the continuance or discontinuance thereof.

(*p*) Fost. 299, 300, where Mr. Justice Foster says, "Let me add, "that if the outrages at which the "statute was levelled had been "prosecuted with due vigour and "proper severity upon the foot of "common law, I doubt not an end "would soon have been put to "them, without incumbering our "books with a special act for that "purpose, and a variety of ques- "tions touching the true extent of "it. This observation will hold "with regard to many of our penal "statutes, made upon special and "pressing occasions, and savour- "ing rankly of the times."

(*q*) 4 Blac. Com. 193. As to the offence of stabbing, where death does not ensue, provision has been made by the 43 G. III. c. 58. which will be stated in a subsequent chapter.

was only declaratory of the common law (*r*); and it was the opinion of Mr. Justice Foster, that whenever the defendant is indicted at common law, and also upon the statute (*s*), the most important question will be, whether the fact upon the evidence is or is not murder at common law (*t*). And Glyn, C. J. said, upon an indictment on this statute, that, in order to bring a case within the meaning of the act, there ought to be malice (*u*).

All circumstances which, at common law, will serve to justify, excuse, or alleviate, in a charge of murder, have always had their due weight in prosecutions grounded on this statute; and, in the construction of it, one general rule may, it is conceived, be safely laid down; namely, that in all cases of doubt and difficulty the benignity of the common law ought to turn the scale (*w*). Thus, though the words of the statute are very general; yet many cases coming within the letter of the act, and not covered by any of the exceptions in the proviso, have been very rightly adjudged not to be within its meaning (*x*). By this construction, the case of an adulterer, stabbed by the husband in the act of adultery, has been held not to be within the act, but manslaughter at common law (*y*). So where a man assaulted by thieves in his house, stabs one of them, the thieves having no weapon drawn, nor having struck him, it is not within the statute, but justifiable homicide (*z*); and where, upon an outcry of

(*r*) Ld. Morley's case, Kel. 55. 1 Hale 456. Fost. 298.

(*s*) "A prisoner, whose case may "be brought within the letter "of the act, commonly is ar- "raigned upon two indictments, "one at common law for murder, "the other upon the statute; and "if it cometh out in evidence, that "the fact was either justifiable, or "amounted barely to manslaugh- "ter at common law, it hath been "rarely known, that such person "hath been convicted of man- "slaughter upon the statute." Fost. 299.

(*t*) Fost. 301, 302.

(*u*) Buckner's case, Sty. 467.

(*w*) Fost. 298, 302.

(*x*) Fost. 298. 4 Blac. Com. 193.

(*y*) 1 Hale 486. 1 Ventr. 158. Sir T. Raym. 212. Fost. 298.

(*z*) Sty. 469. Fost. 298.

thieves in the night time, a person, who was concealed in a closet, but no thief, was in the hurry and surprise stabbed in the dark, it was considered as an innocent mistake, and ruled to be homicide by misadventure (*a*). And where an officer pushed violently and abruptly into a gentleman's chamber early in the morning, in order to arrest him, not telling his business, nor using words of arrest; and the gentleman not knowing that he was an officer, under the first surprise, took down a sword that hung in the chamber, and stabbed him; it was ruled manslaughter at common law, though the defendant was indicted on the statute; for the defendant, not knowing the officer's business, might, from his behaviour, have reasonably concluded, that he came to rob or murder him (*b*).

No accessories, nor aiders and abetters.

There are no accessories within this statute (*c*): and it has been holden, that persons present, aiding and abetting, though, at common law, principals in the manslaughter, are not within the statute; and therefore, where several persons were indicted upon it, and it did not appear which of them made the thrust at the party killed, they being all present, it was held that they could only be convicted of manslaughter at common law, and must have their clergy (*d*).

Particular points upon the construction of the statute.

It may be proper to mention some of the questions, which have been raised and decided upon the construction of this statute; more particularly as to the meaning of the words "stab or thrust;" as to the person "that hath not then any weapon drawn;" as to what is considered as "a weapon drawn;" and as to the meaning of the words "that hath not then first stricken the party, which shall so stab or thrust."

(*a*) 1 Hale 474, Cro. Car. 538. Fost. 299.

(*b*) 1 Hale 470, and see Kel. 136. Fost. 298, 299. 1 East. P. C. c. 5. s. 29. p. 251, where it is said, that perhaps there were circumstances in the case not mentioned, which might reasonably induce such a suspicion, and raise such a fear as might fall in constantem virum.

(*c*) 1 East. P. C. c. 5. s. 29. p. 247.

(*d*) 1 Hale 468. 2 Hale 344. Fost. 301. Alleyn 44. 1 Hawk. P. C. c. 30. s. 7. Sty. 86. 1 East. P. C. c. 5. s. 29. p. 247.

Meaning of the words "*stab* or *thrust.*"

Under the words "stab or thrust," shooting with any sort of fire arms, and thrusting with a staff, or any other blunt weapon, have been brought within the act: and the case of shooting with fire arms will govern the cases of sending an arrow out of a bow, or a stone from a sling, or using any device of that kind, holden in the hand of the party at the instant of discharging it (*c*). The case of thrusting with a blunt weapon is supposed to have been in the contemplation of the legislature, as otherwise it would not be easy to account for the exception with regard to the correction of children or servants (*f*): but it is elsewhere said, that the killing a person with a hammer, or such like instrument, which cannot properly come under the words "thrust," or "stab," is not a killing within the statute (*g*); and certainly throwing at a distance, and wounding the party, whereby death ensues, the weapon, be it what it may, being delivered out of the hand at the time the stroke is given, is not considered with strict propriety to come within the terms "stab" or "thrust" (*h*). It may be added, that the stab or thrust ought to be made with a weapon or instrument from which danger was likely to ensue (*i*).

Who shall be said to be a person "*that "hath not then "any weapon "drawn.*"

As to the "person or persons, that hath not then any weapon drawn," it has been properly holden, that these words extend to any other person, acting in concert upon the same design with the party killed (*k*): and if two assault a third person, and one of them strike him, and he kill the other who did not strike, he is not within the statute;

(*e*) 1 Hale 469. Fost. 300. Lord Hale, after saying that if the stabbing or thrusting were with a sword, or with a pikestaff, it is within the statute, says,—So it seems, if it be a shot with a pistol, or a blow with a sword or staff. "*Yet, quære; for Jones, justice, denied it.*"

(*f*) Fost. 300.

(*g*) 1 Hawk. P. C. c. 30. s. 8.

(*h*) Newman's case, Old Bailey, 8 Anne, where the point of a sword was thrown at 20 yards' distance; MS. Denton and Chapple. 1 East. P.C. c. 5. s. 29. p. 248. and Williams's case, 1 Hale 468. W. Jones 432, where a hammer was thrown; and see the opinion of Holt, C. J. as to this case of Williams in Mawgridge's case, Kel. 131.

(*i*) 1 East. P. C. c. 5. s. 29. p. 248.

(*k*) *Id. ibid.*

for it is the assault and striking of both. (*l*). The judges were once divided upon the construction of the word *then*— the party killed "not having *then* any weapon drawn,"— and the point in debate was, whether the word *then* was to be confined to the instant the stab was given, or whether it related to the whole time of the combat (*m*). The circumstances were these. Upon mutual words of reproach between Hunter and De Loy, the former struck the latter with his hand; whereupon De Loy attempted to draw his dagger at Hunter: but being prevented by the company present, he threw a pot at him, and missed him; on which Hunter gave De Loy the mortal wound with his sword. Those who were for the conviction, admitted the pot to be a weapon drawn, as long as it was in De Loy's hand; but thought that after he had thrown it out of his hand, without hurt done, and was afterwards stabbed, the case fell within the statute. On the other hand it was maintained, that the word *then* referred to the *time of the fighting or controversy*, and not to the immediate instant of the wounding: and they thought it unreasonable that one having a weapon drawn at one time during the controversy, and having done all the mischief he could with it, should be within the protection of the statute, which was made to prevent the sudden killing of men without provocation or defence; and they compared it to the case of two who are fighting, and one lets fall his sword, or it is beat out of his hand, and he is then killed; which cases, they conceived, could not be brought within the statute (*n*). It is said, that the latter opinion being more conformable to the principles of the common law, in a case where the meaning of the statute is at least doubtful, seems most to be relied upon; more especially as the prisoner in this case finally had his clergy: and it is laid down as a rule, that if the party killed be at any one instant of time during the controversy out of the protection of the statute, between which time and the time of receiving the mortal wound the

(*l*) Buckner's case, Sty. 467. 1 East. P. C. c. 5. s. 29. p. 248.

(*m*) Fost. 301.

(*n*) Hunter's case, 3 Lev. 255. 1 East. P. C. c. 5. s. 29. p. 248, 249.

common law would allow for the prisoner's blood continuing to be heated, the case will not be governed by this statute (*o*).

What is considered as "*a weapon drawn.*"

An extraordinary cudgel, or other thing proper for defence or annoyance in the hand of the party, has been considered, as a weapon drawn, so as to take the case out of the statute; though the words, "a weapon drawn," seem rather to import a sword or other weapon of that kind, drawn out of the scabbard (*p*). But it has been already shewn, that this statute has been construed with reference to its rigorous nature; and, upon the same principles, the discharging a pistol, or throwing a pot, or candlestick, or other dangerous weapon, at the party, has been holden to be within the equity of the words, "having a weapon drawn (*q*)." This construction, however, does not extend to such an instrument as may not probably do hurt, such as a small riding rod or cane (*r*); and, therefore, what was said by Glyn, C. J. (*s*) that a tobaccopipe had been adjudged a weapon drawn, may admit of question (*t*).

The meaning of the words "*that hath not then first stricken the party, which shall so stab or thrust.*"

The meaning of the words "that hath not then *first* stricken the party, which shall so stab or thrust," was questioned in a case, in which it was ultimately decided that the words "not having first stricken" signify, *not having given the first blow in the affray* (*u*). But one of the judges (*w*) was of a different opinion, and thought that the meaning of the words was, *not having struck before the mortal wound was given:* and this latter opinion, notwithstanding the decision of the case, has been approved by great authorities, the view and spirit of the statute having been more fully sifted and understood. Holt, C. J. says of the decision in that case, that it was against the natural order of the words, and the obvious meaning of the act (*x*). And Mr. Justice Foster

(*o*) 1 East. P. C. c. 5. s. 29. p. 249.
(*p*) Fost. 300, 301. 1 Hale 470.
(*q*) 1 Hawk. P. C. c. 30. s. 8.
(*r*) 1 Hale 470.
(*s*) Buckner's case, Sty. 468.
(*t*) 1 East. P. C. c. 5. s. 29. p. 250.
(*u*) Byard's case, W. Jones 340.
(*w*) Richardson, J.
(*x*) Skin. 668.

thought that the arrangement of the words, as they stand in the statute, seemed to have been inverted, and a construction extorted from them, of which the legislature never dreamt (*y*). Hawkins says expressly, that wherever a person, who happens to kill another, was struck by him in the quarrel, before he gave the mortal wound, he is out of the statute, though he himself gave the first blow (*z*); and Mr. Justice Blackstone speaks of this as the better opinion (*a*).

It is also said, that it may be well to consider, whether these words "having first *stricken*," &c. mean any thing more than having first *assaulted*, &c.; and, therefore, whether the attempt to strike, being in law an assault, and equivalent to an actual striking, is not equally within the plain intent of the act as the stroke itself (*b*).

SECTION III.

CASES OF MUTUAL COMBAT.

Manslaughter in mutual combat.

Instances of mutual combat in which, from the deliberate conduct of the parties, from some undue advantage taken by the party killing, or from the violent conduct which the party killing pursued in the first instance, the conclusion of malice has been drawn, and the killing has consequently amounted to murder, have been shewn in the preceding chapter (*c*). We have now to consider those cases where, upon words of reproach, or any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought or taken on either side: for if death happen under such circumstances, the offence of the party killing will amount only to manslaughter (*d*).

Sudden quarrel.

If therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and

(*y*) Fost. 301.
(*z*) 1 Hawk. P. C. c. 30. s. 6.
(*a*) 4 Blac. Com. 193.
(*b*) 1 East. P. C. c. 5. s. 29. p. 250.
(*c*) *Ante*, 644, *et sequ.*
(*d*) Fost. 295.

go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled (*e*). And it must be observed, with regard to sudden rencounters, that when they are begun, the blood, previously too much heated, kindles afresh at every pass or blow; and in the tumult of the passions, in which mere instinct, self-preservation, has no inconsiderable share, the voice of reason is not heard: therefore the law, in condescension to the infirmities of flesh and blood, has extenuated the offence (*f*).

First blow immaterial, if quarrel sudden, and combat equal.

A. uses provoking language or behaviour towards B., and B. strikes him, upon which a combat ensues, in which A. is killed. This is holden to be manslaughter; for it was a sudden affray, and they fought upon equal terms; and in such combats, upon sudden quarrels, it matters not who gave the first blow (*g*). But it would be otherwise, if the terms were not equal, and if the party killing sought or took undue advantage; as if B., in the foregoing case, had drawn his sword, and made a pass at A., the sword of A. being then undrawn, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed: for this would have been murder, inasmuch as B., by making the pass, his adversary's sword being undrawn, shewed that he sought his blood (*h*). And A.'s endeavour to defend himself, which he had a right to do, will not excuse B.: but if B. had first drawn, and forborne till his adversary had drawn too, it had been no more than manslaughter (*i*).

And such an indulgence is shewn to the frailty of human nature, that where two persons, who have formerly fought on malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that

(*e*) 1 Hale 453. 1 Hawk. P. C. c. 31. s. 29. 3 Inst. 51.

(*f*) Fost. 138, 296.

(*g*) Fost. 295. 1 Hale 456.

(*h*) 1 Hawk. P. C. c. 31. s. 27. Fost. 295.

(*i*) 1 Hawk. P. C. c. 31. s. 28. Fost. 295.

they were moved by the old grudge, unless it appear by the whole circumstances of the case (*k*).

If the combat be equal at the onset, the use of a deadly weapon afterwards will not make the offence more than manslaughter.

Though, from the preceding cases, it appears, that not only the occasion must be sudden, but that the party assaulted must be put upon an equal footing in point of defence at the onset, to save the party making the first assault and killing from the guilt of murder; yet if, on any sudden quarrel, blows pass without any intention to kill or injure another materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it will only amount to manslaughter (*l*).

Taylor's case.

John Taylor, a Scotch soldier, and two other Scotchmen, were drinking together in an alehouse, when some servants to the owner of the house, who were also drinking in another box, abused the Scotch nation, and used several provoking expressions towards Taylor and his company, on which Taylor struck one of the servants with a small rattan cane, not bigger than a man's little finger, and another of the Scotchmen struck the same servant with his fist. The servant who was struck went out of the room into the yard, to fetch his fellow servants to turn Taylor and his company out of the room; and, in the mean time, an altercation ensued between Taylor and the deceased, who was the owner of the house, but not the occupier, and who had come into the room after the servant went into the yard. He insisted that Taylor should pay for his liquor, and go out of the house; and Taylor, after some further altercation, was going away, when the deceased laid hold of him by the collar, and said, "he should not go away till he had paid for the liquor;" and then threw him down against a settle. Taylor then paid for the liquor; whereupon the deceased laid hold of him again by the collar, and shoved him out of the room into the passage: and Taylor then said, "that he did

(*k*) 1 Hawk. P. C. c. 31. s. 30. (*l*) 1 East. P. C. c. 5. s. 26. p. 243. 1 Hale 452, and see *ante*, 649.

not mind killing an Englishman more than eating a mess of crowdy." The servant, who had been originally struck with the cane, then came and assisted the deceased, who had hold of Taylor's collar; and together they violently pushed him out of the door of the alehouse: whereupon Taylor instantly turned round, drew his sword, and gave the deceased the mortal wound. This was adjudged manslaughter (*m*).

In another case of a similar kind, where the jury had found the prisoner guilty of murder, the following facts were stated for the opinion of the judges. The prisoner, whose name was William Snow, and who was a shoemaker, lived in the same neighbourhood as the deceased, and at no great distance from him. On the afternoon of the day mentioned in the indictment, the prisoner, very much intoxicated by liquor, passed accidentally by the house of the deceased's mother, while the deceased was thatching an adjacent barn. They entered into conversation; but on the prisoner's abusing the mother and sister of the deceased, very high words arose on both sides, and they placed themselves in a posture to fight. The mother of the deceased, hearing them quarrel, came out of her house, threw water over the prisoner, hit him in the face with her hand, and prevented them from boxing. The prisoner went into his own house; and in a few minutes came out again, and sat himself down upon a bench before his garden gate, at a small distance from the door of his house, with a shoemaker's knife in his hand, with which he was cutting the heel of a shoe. The deceased having finished his thatching, was returning in his way home, by the prisoner's house: and on passing the prisoner, as he sat on the bench, the deceased called out to him, "Are not you an aggravating rascal?" The prisoner replied, "What will you be, when you are got from your master's feet?" On which the deceased seized the prisoner by the collar; and dragging him off the bench, they both rolled down into the cartway. While they were struggling Snow's case.

(*m*) Taylor's case, 5 Burr. 2793. 1 Hawk. P. C. c. 31. s. 39.

and fighting, the prisoner underneath, and the deceased upon him, the deceased cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to secure it; but the prisoner kept striking about with one hand, and held the deceased so hard with the other hand, that the deceased could not disengage himself. He made, however, a vigorous effort, and by that means drew the prisoner from the ground; and during this struggle the prisoner gave a blow, on which the deceased immediately exclaimed, "The rogue has stabbed me to the heart; I am a dead man;" and expired. Upon inspection, it appeared, that he had received three wounds, one very small on the right breast; another on the left thigh, two inches deep, and half an inch wide; and the mortal wound on the left breast. After great argument and consideration, the judges determined that the offence was only manslaughter (*n*).

It appears that the judges thought, in this case, that there was not sufficient evidence that the prisoner lay in wait for the deceased, with a malicious design to provoke him, and under that colour, to revenge his former quarrel, by stabbing him; which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by, neither provoked him by word or gesture. The deceased began first by ill language, and afterwards by collaring and dragging him from his seat, and rolling him in the road. The knife was used openly before the deceased came by, and not concealed from the bystanders: though the deceased in his passion did not perceive it till they were both down. And though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, the judges thought that the offence only amounted to manslaughter; and the prisoner was recommended for a pardon (*o*).

(*n*) Snow's case, 1 Leach, 151. who cites Serjeant Foster's MS.

(*o*) 1 East. P. C. c. 5. s. 26. p. 245.

Third person interfering on the combat of others.

It is said, that he shall be adjudged guilty of manslaughter, who seeing two persons fighting together on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other (*p*). And it seems clear that if a master, maliciously intending to kill another, take his servants with him without acquainting them with his purpose, and meet his adversary, and fight with him, and the servants seeing their master engaged, take part with him, and kill the other, they would be guilty of manslaughter only, but the master of murder. (*q*) From this it follows, *à fortiori*, that if a man-servant or friend, or even a stranger, coming suddenly, and seeing him fighting with another man, side with him, and kill the other man, or seeing his sword broken send him another, wherewith he kills the other man; such servant, friend, or stranger, will be only guilty of manslaughter.(*r*) But this supposes that the person interfering does not know that the fighting is upon malice; for though if A. and B. fight upon malice, and C., the friend or servant of A., not being acquainted therewith, come in and take part against B., and kill him, this (though murder in A.) is only manslaughter in C.: yet it would be otherwise, if C. had known that the fighting was upon malice; for then it would be murder in both. If A. having been assaulted, retreats as far as he can, and then his servant kills the assailant, it will be only homicide *se defendendo*: but if the servant had killed him before the master had retreated as far as he could, it would have been manslaughter in the servant. And the law is the same in the case of the master killing the other in defence of the servant. (*s*)

If two persons be fighting, and another interfere with in-

(*p*) 1 Hawk. P. C. c. 31. s. 35.

(*q*) 1 Hawk. P. C. c. 31. s. 55. 1 Hale 438. Plow. Com. 100. b. Salisbury's case.

(*r*) 1 Hawk. P. C. c. 31. s. 56. 1 East. P. C. c. 5. s. 58. p. 290.

(*s*) 1 East. P. C. c. 5. s. 58. p. 292, and the authorities there cited, 1 Hale 484. So Tremain says, that a servant may kill a man to save the life of his master, if he cannot otherwise escape. 21 H. VII. c. 39. Plowd. Com. 100. 1 MS. Sum.

tent to part them, but do not signify such intent, and he be killed by one of the combatants, this is but manslaughter. (*t*) And if a third person should take up the cause of one who has been worsted in mutual combat, and should attack the conqueror, and be killed by him, the killing would, it seems, be manslaughter. A. and B. were walking together in *Fleet-street*, and B. gave some provoking language to A. who, thereupon, gave B. a box on the ear, upon which they closed, and B. was thrown down, and his arm broken. Presently, B. ran to his brother's house, which was hard by; and C., his brother, taking the alarm, came out with his sword drawn, and made towards A., who retreated ten or twelve yards; and C. pursuing him, A. drew his sword, made a pass at C., and killed him. A. being indicted for murder, the court directed the jury to find it manslaughter; not murder, because it was upon a sudden falling out; not *se defendendo*, partly because A. made the first breach of the peace by striking B.; and partly because, unless he had fled as far as might be, it could not be said to be in his own defence; and it appeared plainly upon the evidence, that he might have retreated out of danger, and that his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon C., than to avoid him: and accordingly, at last, it was found manslaughter. (*u*)

A party of men were playing at bowls, when two of them fell out and quarrelled; and a third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died: and this was held manslaughter, because it happened upon a sudden motion in revenge of his friend. (*w*) But it must be intended that the two men who fell out were actually fighting together at the time; for if words only had passed between them, it would have been murder; nothing but an open affray

(*t*) 1 East. P. C. c. 5. s. 59. p. 292. *Newgate*, 1671. Kel. 66.

(*u*) 1 Hale 482, 483. A case at

(*w*) 12 Rep. 87.

or striving being such a provocation to one person to meddle with an injury done to another as will lessen the offence to manslaughter, if a man be killed by the person so meddling. (*x*)

Though Lord Hale and others appear sometimes to intimate a distinction between the interference of servants and friends, and that of a mere stranger, yet the limits between them do not appear to be any where accurately defined. And it has been observed, that the nearer or more remote connexion of the parties with each other seems to be more a matter of observation to the jury as to the probable force of the provocation, and the motive which induced the interference, than as furnishing any precise rule of law grounded on such a distinction. (*y*)

Blow intended for one individual lighting on another.

As a blow aimed with malice at one individual, and by mistake or accident, falling upon another and killing him, will amount to murder; (*z*) so if a blow intended against A. and lighting on B. arose from such a sudden transport of passion as, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it should happen to kill B. (*a*)

Brown's case.

A quarrel arose between some soldiers and a number of keelmen at Sandgate; and, a violent affray ensuing, one of the soldiers was stripped, and a party of five or six came up and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man." The prisoner, who was a soldier, had before driven part of the mob down the street with his sword in the scabbard; and on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying, he would sweep the street; and on their pressing on him, he struck at them with the flat side of

(*x*) See the opinion of the judges in Huggett's case, Kel. 59, and 1 East. P. C. c. 5. s. 89. p. 328, 329.

(*y*) 1 East. P.C. c. 5. s. 58. p. 292.

(*z*) *Ante*, 658, 659.

(*a*) Fost. 262.

the sword several times; upon which they fled, and he pursued them. The soldier who was stripped got up, and ran into a passage to save himself. The prisoner returned, and asked if they had murdered his comrade; and the people came back, and assaulted him several times, and then ran from him. He sometimes brandished his sword; and then struck fire with the blade of it upon the stones of the street, calling out to the people to keep off. At this time the deceased, who had a blue jacket on, and might be mistaken for a keelman, was going along about five yards from the soldier; but, before he passed, the soldier went to him, and struck him on the head with his sword, of which blow he almost immediately expired. It was the opinion of two witnesses that, if the soldier had not drawn his sword, they would both of them have been murdered. The judges were clearly of opinion that this was only manslaughter. (*b*).

SECTION IV.

CASES OF RESISTANCE TO OFFICERS OF JUSTICE; TO PERSONS ACTING IN THEIR AID; AND TO PRIVATE PERSONS LAWFULLY INTERFERING TO APPREHEND FELONS, OR TO PREVENT A BREACH OF THE PEACE.

It has been before mentioned as a general rule, that where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, and killed, it will be murder in all who take part in such resistance (*c*). But this protection of the law is extended only to persons who have proper authority, and who use that authority in a proper manner; (*d*) wherefore questions of nicety and difficulty have frequently arisen upon the points of authority, legality of process, notice, and regularity of proceeding: and as the consequence of defects in

(*b*) Brown's case, 1 Leach 148. 1 East. P. C. c. 5. s. 27. p. 245, 246.

(*c*) *Ante*, 652.

(*d*) Fost. 319.

any of these particulars is in general that the offence of killing the person resisted is extenuated to manslaughter; it will be proper in this place to consider some of those questions which have met with judicial decision.

Authority of officers and others to arrest and imprison in cases of felony.

The authority to arrest and imprison is greater in cases of felony than in matters of mere misdemeanour; and least of all in civil suits.

If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours to prevent an escape; and in such cases, if fresh suit be made, and, à fortiori, if hue and cry be levied, all who join in aid of those, who began the pursuit, will be under the same protection of the law: and the same rule holds, if a felon, after arrest, break away as he is being carried to gaol, and his pursuers cannot retake him without killing him (*e*). Thus where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorised by law to pursue and apprehend the malefactors; and that, although there were no warrant of a justice of the peace, to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons; and that, therefore, the killing of any of the pursuers was murder (*f*).

Authority of private persons to arrest, &c. in cases of felony.

But where private persons use their endeavours to bring felons to justice, some cautions ought be observed. In the first place, it should be ascertained that a felony has actually been committed: for if that be not the case, no suspicion, however well grounded, will bring the person so in-

(*e*) 1 Hale 489, 490. 1 Hawk. P.C. c. 28. s. 11. Fost. 309. 1 East. P. C. c. 5. s. 67. p. 298.

(*f*) Jackson's case, 1 Hale 464, *ante*, 653, 654.

terposing within the protection which the law extends to persons acting with proper authority (*g*). If it is clear that a felony has been committed, the next consideration will be, whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavouring to arrest or imprison within the protection of the law, so far as to excuse him from the guilt of manslaughter, if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice (*h*).

Distinctions between the authority of officers and private persons.

These distinctions between officers and private persons proceed upon the principle of discouraging persons from proceeding to extremities upon their own private suspicion or authority. And upon this principle, it appears to have been considered, that a private person is not bound to arrest any one standing *indicted* for felony, against whom no warrant can be produced at the time; and, therefore, the law does not hold out the same indemnity to such person, as it does to constables and other peace officers, who are *ex officio* not merely permitted, but enjoined by law, to arrest the parties, as well on probable suspicion of felony, as in case of felony actually committed; and who may therefore well arrest upon the finding of the fact by the grand inquest on oath, which is suspicion grounded on high authority (*i*). In this case,

(*g*) 2 Inst. 52, 172. Fost. 318. Samuel *v.* Payne, Dougl. 359. And in Coxe *v.* Wirrall, Cro. Jac. 194, it was holden, that, without a fact, suspicion is no cause of arrest; and 8 Ed. IV. 3. 5 Hen. VII. 5. 7 Hen. IV. 35. are cited.

(*h*) 1 Hale 490. Fost. 318.

(*i*) 2 Hale 84, 85, 87, 91, 93. *sed vide* 1 Hale 489, 490. Hawkins, in alluding to the power of arrest by officers in this case, gives as a reason that there is a charge against the party on record. 1 Hawk. P. C. c. 28. s. 12. But upon this, it is remarked, that it does not readily

however, it might perhaps be well contended, that a person arresting another with the knowledge of the indictment having been found, cannot be properly considered as acting upon his own private suspicion or authority; and ought, therefore, to have the same protection as the officers of justice. And it seems agreed, that the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon (*k*): but it is said, that, if he be killed, their justification must depend upon the fact of the party's guilt, which it will be incumbent on them to make out; otherwise, they will be guilty of manslaughter (*l*).

Even in the case of a constable, it was formerly supposed to be necessary, that there should have been a felony committed in fact, which the constable must have ascertained at his peril: but it has since been determined, that a peace officer may justify an arrest on a charge of felony, on reasonable cause of suspicion, without a warrant; although it should afterwards appear that no felony had been committed (*m*). And where a private person suspecting another of felony, has laid his grounds of suspicion before a constable, and required his assistance to take him, the constable may justify killing the party, if he fly, and cannot otherwise be taken, though in truth he were innocent. But in such case, where no hue and cry is levied, the party suspecting ought to be present, as the justification must be that the constable did aid him in taking the party suspected: and the constable ought to be informed of the grounds of suspicion, that he may judge of the reasonableness of it (*n*).

occur, why officers only can take notice of a charge on record, 1 East. P. C. c. 5. s. 68. p. 300.

(*k*) Dalt. c. 170. s. 5. 1 East. P.C. c. 5. s. 68. p. 301.

(*l*) 2 Hale 83, 92. and see 1 East. P. C. c. 5. s. 68. p. 301, where it is said, that if the fact of the guilt of the party be necessary for their complete justification, it is conceived, that the bill of indictment found by the grand jury would, for that purpose, be *primâ facie* evidence of the fact.

(*m*) Samuel *v.* Payne, Dougl. 359.

(*n*) 2 Hale 79, 80, 91, 92, 93. 3 Inst. 221. 1 East. P. C. c. 5. s. 69. p. 301.

Authority to arrest and imprison in cases of misdemeanors.

A constable, or other known conservator of the peace, may lawfully interpose upon his own view to prevent a breach of the peace, and to quiet an affray; and if he or any of his assistants, whether commanded or not, be killed, it will be murder in all who take part in the resistance; there being either implied or express notification of the character in which he interposed (*o*). It has, however, often been questioned, how far a constable or other peace officer is authorized to arrest a person upon a charge by another of a mere breach of the peace, after the affray is ended, and peace restored, without a special warrant from a magistrate; and it appears to be the better opinion, that he has no such authority (*p*). But if one menace another to kill him, and complaint be made thereof to the constable forthwith, such constable may, in order to avoid the present danger, arrest the party, and detain him till he can conveniently bring him to a justice of the peace (*q*).

Of apprehending night-walkers.

It has been said, that if peace officers meet with *night-walkers*, or persons unduly armed, who will not yield themselves, but resist or fly before they are apprehended, and

(*o*) 1 Hale 463. 1 Hawk. P. C. c. 31. s. 54. Fost. 310, 311. 1 East. P. C. c. 5. s. 71. p. 303.

(*p*) 1 East. P. C. c. 5. s. 72. p. 305, who cites 2 Inst. 52. 2 Hawk. P. C. c. 12. s. 20. and c. 13. s. 8. 2 Lord Raym. 1301. Strickland *v.* Pell, Dalt. c. 1. s. 7. and says, that there can be no such authority for the purpose of imprisoning or compelling the party to find sureties; though Lord Coke says, (4 Inst. 265) that a constable may take surety of the peace by obligation. Lord Hale and some later authorities have holden, that such officer may arrest the party upon the charge of another, though the affray be over, for the purpose of bringing him before a justice, to find sureties of the peace, or for appearance. 2 Hale 90. Handcock *v.* Sandham and others, 1785, and Williams *v.* Dempsey, 1787, cited in East. P. C. *id.* 306. But see *ante*, 392. 394.

(*q*) 2 Hale 88. This power seems to be grounded on the duty of the officer to prevent a probable felony; and must be governed by the same rules which apply to that case; though Dalton (ch. 116. s. 3.) extends it even to the prevention of a battery. Vide 1 East. P.C. c. 5. s. 72. p. 306.

who are upon necessity slain, because they cannot otherwise be overtaken, it is no felony in the officers or their assistants, though the parties killed were innocent (*r*). But it is doubted whether, at this day, so great a degree of severity would be either justifiable or necessary (especially in the case of bare flight), unless there were a reasonable suspicion of felony (*s*). And it has been considered, that the taking up of a person in the night, as a night-walker and disorderly person, though by a lawful officer, would be illegal, if the person so arrested were innocent, and there were no reasonable grounds of suspicion to mislead the officer (*t*).

(*r*) 2 Hale 85, 97. By 2 Ed. III. c. 3. and 5 Ed. III. c. 14. peace officers are required to apprehend night-walkers, and persons unduly armed, till morning, that they may be examined. And see Lawrence *v.* Hedger, 3 Taunt. 14.

(*s*) 1 East. P. C. c. 5. s. 70. p. 303. Both the statutes mentioned in the last note were levelled against particular descriptions of offenders, who roved about the country in bodies, in a daring manner.

(*t*) Tooley's case, 2 Lord Raym. 1296. There is a MS. note of this case given by the editor of Lord Hale (2 Hale 89,) which states Lord Holt to have said, that, of late, constables had made a practice of taking up people only for walking the streets; but that he knew not whence they had such authority. But see Lawrence *v.* Hedger, 3 Taunt. 14, where it was holden that watchmen and beadles have authority, at common law, to arrest and detain in prison, for examination, persons walking in the streets at night, whom there is reasonable ground to suspect of felony, although there is no proof of felony having been committed. And it has been said by Hawkins and others, that every *private person* may, by the common law, arrest any suspicious night-walker, and detain him till he give a good account of himself. 2 Hawk. P. C. c. 13. s. 6. c. 8. s. 38. and it has been held, that a person may be indicted for being a common night-walker, as for a misdemeanor. 2 Hawk. P. C. c. 8. s. 38. Latch. 173. Poph. 208. And by a late statute 54 G. III. c. 37. s. 18. after reciting that divers ill-disposed and suspected persons and reputed thieves frequent places of public resort, the avenues leading thereto, and the streets and highways, with intent to commit felony on the persons and property of his Majesty's subjects, and that, although their evil purposes are sufficiently manifest, the power of the justices of the peace to demand of them sureties for their good behaviour hath not been of sufficient effect to prevent them from carrying their evil purposes into execution, it is enacted, that it shall be lawful

Officers taking opposite parties.

It has sometimes happened that peace officers have taken opposite parties in an affray, and the death of one of them has ensued; as in the case put by Lord Hale, where A. and B., being constables of the vill of C., and a riot or quarrel happening between several persons, A. joined with one party, and commanded the adverse party to keep the peace, and B. joined with the other party, and in like manner commanded the adverse party to keep the peace, and the assistants and party of A. in the tumult killed B. (*u*). This, Lord Hale says, seems but manslaughter, and not murder, inasmuch as the officers and their assistants were engaged one against the other, and each had as much authority as the other (*w*): but upon this it has been remarked, that perhaps it had been better expressed, to have said, that inasmuch as they acted not so much with a view to keep the peace, as in the nature of partisans to the different parties, they acted altogether out of the scope of their characters as peace officers, and without any authority whatever (*x*). And in another case, Lord Hale says, that if the sheriff have a writ of possession against the house and lands of A., and A. pretending it to be a riot upon him, gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable be killed, this is not so much as manslaughter; but if any of the sheriff's officers were killed, it would be murder, because the constable had no authority to encounter the sheriff's proceeding when acting by virtue of the king's writ (*y*).

There is a late case, which appears to have been ruled upon the foregoing principles. Some sheriffs' officers hav-

for any constable, headborough, patrole, watchman, or other person, to apprehend every *such* suspected person or reputed thief, and convey him or them before any justice of the peace. This act, however, is to continue in force only till the 1st of June, 1820, and from thence till the expiration of six weeks from the commencement of the then next session of parliament.

(*u*) 1 Hale 460.

(*w*) *Id. Ibid.*

(*x*) 1 East. P. C. c. 5. s. 71. p. 304.

(*y*) 1 Hale 460.

ing apprehended a man by virtue of a writ against him, a mob collected, and endeavoured by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and as it was thought for some time had killed her : whereupon, and before her recovery was ascertained, the constable was sent for, and charged with the custody of the bailiff who had struck the woman. The bailiffs, on the other hand, gave the constable notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which, he proceeded to take them into custody upon the charge of murder; and at first, offered to take care also of their prisoner, but the latter was soon rescued from them by the surrounding mob. The woman having recovered, the bailiffs were released by the constable the next morning. Upon an indictment for an assault and rescue, Heath, J. was clearly of opinion, that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly (*z*).

Private persons interposing in sudden affrays.

Where private persons interpose in the case of sudden affrays, to part the combatants, and prevent mischief, and give express notice of their friendly intent, it will be murder in either of the persons making the affray, who shall kill the party so interposing; but it will not be murder in the other affrayer, unless he also strike the party (*a*).

Authority to arrest and imprison in civil suits.

It has been shewn that though, even in *civil* cases, an officer may repel force by force, where his authority to arrest or imprison is resisted, and may do this to the last extremity in cases of reasonable necessity (*b*); yet if the party against whom the process has issued fly from the officer endeavouring to arrest him, or if he fly after an arrest actually made,

(*z*) Anon. *Exeter* Sum. Ass. 1793, 1 East P. C. c. 5. s. 71. p. 305.

(*a*) 1 Hawk. P. C. c. 31. s. 48, 54.

Fost. 272, 311. 1 East. P. C. c. 5, s. 71. p. 304. *ante*, 392.

(*b*) *Ante*, 665.

or out of custody, in execution for debt, the officer has no authority to kill him, though he cannot overtake or secure him by any other means (*c*).

The authority of an officer, in civil cases, must be regulated and limited by the writ or process which he is empowered to execute, and by the extent of the district in which he is privileged to act. It is only in the character of officer that he can proceed to arrest or imprison, as no private person can of his own authority arrest in civil suits (*d*).

Authority to impress seamen.

A press warrant extends in terms to "seamen, seafaring men, and others, whose occupations and callings are to work in vessels and boats upon rivers;" (*e*) and persons of this description may be impressed to serve on board his Majesty's ships of war, by those who have proper authority delegated to them for that purpose. (*f*) A proceeding which has been sometimes considered as hardly consistent with the temper and genius of a free government, but which may be defended on the ground of its necessity for the safety of the state; in order that the government may be enabled, in time of need, thus peremptorily to call for the services of persons who have freely chosen a seafaring life, and whose education and habits have fitted them for the employment.

But as this is a power of an extraordinary nature, it is highly requisite that no persons should assume it without being duly qualified for that purpose; as the especial protection which the law affords to its officers will not be extended to those who venture to act without proper authority. Thus, where the execution of a press-warrant is directed by the terms of the warrant (as is now always the

(*c*) 1 Hale 481. Fost. 271.

(*d*) 1 Hawk. P. C. c. 28. s. 19.

(*e*) Rex *v.* Softly, 1 East. R. 466. 1 East. P. C. c. 5. s. 75. p. 307. The same terms occur also in the warrant in Broadfoot's case. Fost. 156.

(*f*) Broadfoot's case, 18 St. Trial (by Howell) 1323. Fost. 154. where see an elaborate argument delivered by Mr. J. Foster, as recorder of *Bristol*, in support of the legality of impressing seamen.

case) not to be intrusted to any person but a commissioned officer, the execution of it by another person will be illegal. As in a case where the lieutenant of a press-gang, to whom the execution of a warrant was properly deputed, remained in King Road, in the port of Bristol, while his boat's crew went some leagues down the channel, by his directions, to press seamen. This was illegal; and when, in the furtherance of that service, one of the press-gang was killed by a mariner in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only manslaughter, though no personal violence had been offered by the press-gang. (*g*) And upon the same principles, where the mate of a ship and a party of sailors, without either the captain who had the press-warrant or the lieutenant who was regularly deputed to execute it, impressed a man, and upon his making some resistance, one of the party struck him a violent blow with a large stick, of which he died some days after, it was adjudged murder. (*h*) And, in another case, the delegation of the power of impressing by a lieutenant (to whom the warrant had been directed) to a petty officer and several others, to whom he had given verbal orders to impress certain seafaring men, of whom he had received intelligence, was decided to be clearly bad; though it was found to be the constant usage and invariable custom of the navy for all commissioned officers, having in their custody such press-warrants, to give verbal orders to such petty officers whom they might think fit to employ upon the impress service, and that such petty officers usually acted without any other authority than such verbal orders. (*i*)

(*g*) Broadfoot's case, Fost. 154. But if a warrant be directed to several, one of them may execute it. 1 Hale 459.

(*h*) Dixon's case, 1 East. P. C. c. 5. s. 80. p. 313. and see also Browning's case, 1 East. P. C. c. 5. s. 80. p. 312.

(*i*) Borthwick's case, Dougl. 207. The warrant enjoined all mayors, &c. to aid and assist the officer to whom it was directed, *and those employed by him* in the execution thereof.

The authority to arrest and imprison can only be exercised by a legal officer within the proper district.

The party taking upon himself to execute process, whether by writ or warrant, must be a legal officer for that purpose, or his assistant: and if an officer make an arrest out of his proper district, or have no warrant or authority at all, or if he execute process out of the jurisdiction of the court from whence it issues, he will not be considered as a legal officer entitled to the special protection of the law: and therefore, if a struggle ensue with the party injured, and such officer be killed, the crime will be only manslaughter. (*k*) Thus, if the constable of the vill of A. come into the vill of B. to suppress some disorder, and in the tumult the constable be killed in the vill of B., this will be only manslaughter, because he had no authority in B. as constable. (*l*) But it seems, that if the constable of the vill of A. have a particular precept from a justice of peace directed to him by name, or by his name of office as constable of A., to suppress a riot in the vill of B., or to apprehend a person in the vill of B. for some misdemeanor within the jurisdiction and conusance of the justice of peace, and in pursuance of that warrant he go to arrest the party in B., and in executing his warrant be killed in B., this will be murder. For though in such case it seems that the constable was not bound to execute the warrant out of his jurisdiction, nor could do it *virtute officii* as constable of A., yet he might do it as bailiff or minister, by virtue of the warrant; since a justice of peace may, for a matter within his jurisdiction, issue his warrant to a private person or servant: but then such person must shew his warrant, or signify the contents of it. (*m*)

(*k*) 1 Hale 457, 458, 459. 1 East. P. C. c. 5. s. 80. p. 312, 314.

(*l*) 1 Hale 459.

(*m*) 1 Hale 459. 2 Hawk. P. C. c. 13. s. 27, 30. It should seem that a constable out of his jurisdiction, or a private person, when directed to execute a particular warrant, ought to be specially sworn for the purpose. Every act which a constable does within his jurisdiction, is done under the obligation of his oath of office; and it would seem to be even more requisite and proper that if, when acting out of his jurisdiction, he is to be entitled to the same protection, he ought to act under the same sacred obliga-

It may be observed, that if a warrant be directed to several persons, any of them may execute it. (*n*).

As to the legality of the process.

Where an officer endeavouring to execute process is resisted and killed, the crime will not amount to murder, unless the *process is legal;* but by this is to be understood only that the process, whether by writ or warrant, must not be defective in the frame of it, and must issue in the ordinary course of justice from a court or magistrate having jurisdiction in the case. (*o*) Therefore, though there may have been error or irregularity in the proceeding previous to the issuing of the process, it will be murder if the sheriff or other officer should be killed in the execution of it; for the officer to whom it is directed must, at his peril, pay obedience to it. (*p*) And for this reason, if a capias ad satisfaciendum, fieri facias, writ of assistance, or any other writ of the like kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for this murder, to produce the writ and warrant, without shewing the judgment or decree. (*q*) So, though the warrant of a justice of peace be not in strictness lawful, as if it do not express the cause with sufficient particularity; yet, if the matter be within his jurisdiction, the killing of the officer executing the warrant will be murder; for it is not in the power of the officer to dispute the validity of the warrant, if it be under the seal of the justice. (*r*) It may be

tion. It may be here mentioned, that by 24 Geo. II. c. 44. s. 6. if a warrant is irregular in the frame of it, the officer executing it ministerially is indemnified against any action for damages by the party injured, though the magistrate by whom it was issued exceeded his jurisdiction.

(*n*) 1 Hale 459.

(*o*) Fost. 311. An attachment issued, and signed by the county clerk in his own cause, is legal process: for it was held, that in issuing it the county clerk acted merely in a ministerial capacity, and not as judge in his own cause. Baker's case, 1 Leach 112.

(*p*) Fost. 311. 1 Hale 457.

(*q*) Rogers's case, *Cornwall* Sum. Ass. 1735, ruled by Lord Hardwicke. Fost. 311, 312, *ante*, 683.

(*r*) 1 Hale 459, 460. It is said, however, that this must be under-

observed also, that in all kinds of process, both civil and criminal, the falsity of the charge contained in such process will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice: (*s*) and therefore, in the case of an escape warrant, the person executing it was held to be under the special protection of the law, though the warrant had been obtained by gross imposition on the magistrate, and by false information as to the matters suggested in it. (*t*)

Process defective in the frame of it.

But if the process be defective in the frame of it, as if there be a mistake in the name or addition of the person on whom it is to be executed; or if the name of the officer or the party be inserted without authority, and after the issuing of the process; and the officer endeavouring to execute it be killed; this will amount to no more than manslaughter in the person whose liberty is so invaded. (*u*)

Of the illegality of blank warrants.—Stockley's case.

It appears to have been formerly a very common practice to issue *blank warrants*, notwithstanding their illegality; a practice exceedingly reprehensible, and which, in the following case, afforded, to a desperate and atrocious offender, a shelter from the capital punishment which he well merited, by extenuating his crime of killing the person who assisted in executing the warrant to manslaughter. The prisoner Stockley, about Lady-day 1753, had been arrested by Welch, the deceased, at the suit of one Bourn, but was rescued; and he afterwards declared, that if Welch offered to arrest him again, he would shoot him. A writ of rescue was made out at the suit of Bourn, and carried to the office of a Mr. Deacle (who acted for the undersheriff of Staffordshire) to have warrants made out upon such writ. The custom of

stood of a warrant containing all the essential requisites of one. 1 East. P. C. c. 5. s. 78. p. 310.

(*s*) 1 East. P. C. c. 5. s. 8. p. 310.

(*t*) Curtis's case, Fost. 135. And see Fost. 312.

(*u*) 1 Hale 457. 1 Hawk. P. C. c. 31. s. 64. Fost. 312. 1 East. P. C. c. 5. s. 78. p. 310. Sir Henry Ferrers's case, Cro. Car. 371.

the under-sheriff was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion required. Deacle made out a warrant against Stockley upon one of these blank pieces of paper, and delivered it to Welch, who inserted therein the names of Thomas Clewes and William Davil, on the 12th July, 1753. On the 19th of September following, Welch, Davil, Clewes, and one Howard, the person to whom Stockley had declared he would shoot Welch, went to arrest Stockley on this warrant. Clewes and Davil, having the warrant, went into Stockley's house first, and called for refreshment; but, an alarm being given that Welch was coming, the door was locked: upon which Clewes arrested Stockley on this illegal warrant, who thereupon fell upon Clewes, and thrust him out of doors, but kept Davil within, and beat him very dangerously, he crying out murder. On hearing this, Welch and Howard endeavoured to get into the house; and Welch broke open the window, and had got one leg in, when Stockley shot and killed him. Stockley then absconded, and was not apprehended till December, 1771. At the Lent Assizes following he was tried for murder, when the jury expressly found that the deceased attempted to get into the house to assist in the arrest of Stockley. Howard, Clewes, and Davil, being dead, their depositions before the coroner were read, and minutes were taken of the above facts for a special verdict; but, to save expence, the case was referred to the judges of the King's Bench; who certified that the offence amounted, in point of law, only to manslaughter. (*w*)

Other cases as to the illegality of blank warrants.

This practice of issuing blank warrants was reprobated in a more recent case, where the sheriff having directed a warrant to A. by name, and all his other officers, the name of another of the sheriff's officers B. was inserted after the warrant was signed and sealed by the sheriff; and, therefore,

(*w*) Stockley's case, 1772, Serjt. Forster's MS. 1 East. P. C. c. 5. s. 78. p. 310, 311. The case was so decided without argument.

an arrest by B. was holden illegal. (*x*) And in another case it was considered that the arrest was illegal, where the warrant was filled up after it had been sealed. (*y*) But where a magistrate who kept by him a number of blank warrants ready signed, on being applied to, filled up one of them, and delivered it to the officer, who, in endeavouring to arrest the party, was killed; it was held that this was murder in the person killing the officer, and he was accordingly executed. (*z*)

It may be proper to remark a circumstance in the preceding case of Stockley, which has been thought to deserve consideration, (*a*) namely, that he had before deliberately resolved upon shooting Welch in case he offered to arrest him again, which in all probability it might be his duty to do. It certainly resembles a former case, where, upon some officers breaking open a shop door to execute an escape warrant, the prisoner, who had previously sworn that the first man that entered should be a dead man, killed one of them immediately by a blow with an ax. A few of the judges to whom this case was referred, were of opinion that this would have been murder, though the warrant had not been legal, and though the officers could not have justified the breaking open the door, upon the grounds of the brutal cruelty of the act, and of the deliberation manifested by the prisoner, who, looking out of a window with the ax in his hand, had sworn, before any attempt to enter the shop, that the first man that did enter should be a dead man. (*b*) But in another case, prior to either of these, where the cruelty and the deliberation were of a similar kind, the crime was considered as extenuated by the illegality of the officer's proceeding. A bailiff having a warrant to arrest a person upon a capias ad satisfaciendum, came to his house, and gave him

(*x*) Housin *v.* Barrow, 6 T. R. 122.

(*y*) Stevenson's case, 10 St. Tr. 462.

(*z*) Per Lord Kenyon, in Rex *v.* The Inhabitants of Winwick, 8 T. R. 454, who there mentions it as a case determined by the judges some years before.

(*a*) 1 East. P. C. c. 5. s. 78. p. 311.

(*b*) Curtis's case, 1756. Fost. 135.

notice; upon which the person menaced to shoot him if he did not depart: the bailiff did not depart, but broke open the window to make the arrest, and the person shot him, and killed him. It was holden that this was not murder, because the officer had no right to break the house; but that it was manslaughter, because the party knew the officer to be a bailiff. (*c*)

As to notice of the authority to arrest.

The parties whose liberty is interfered with, must have due notice of the officer's business; or their resistance and killing of such officer will amount only to manslaughter (*d*). Thus, where a bailiff pushed abruptly and violently into a gentleman's chamber early in the morning, in order to arrest him, but did not tell his business, nor use words of arrest, and the party not knowing that the other was an officer, in the first surprise, snatched down a sword, which hung in his room, and killed the bailiff; it was ruled to be manslaughter (*e*). But it will be otherwise, if the officer and his business be known; (*f*) as where a man said to a bailiff who came to arrest him, "Stand off, I know you well enough, come at your peril," and upon the bailiff taking hold of him, ran the bailiff through the body and killed him, it was held to be murder. (*g*) This will apply as well to a special bailiff as to a known officer: but where the party does not shew by his conduct that he is acquainted with the officer and his business, material distinctions arise as to notice of a known officer, and one whose authority is only special. With regard to private persons interfering, as they may do, in case of sudden affrays, in order to part the combatants, and prevent bloodshed, it is quite necessary that they should give express notice of their friendly intent; otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they come to act as parties. (*h*)

(*c*) Cook's case, 1 Hale 458. Cro. Car. 537. W. Jones 429.

(*d*) 1 Hale 458, *et sequ.* 1 Hawk. P. C. c. 31. s. 49, 50. Fost. 310.

(*e*) 1 Hale 470, case at *Newgate*, 1657. And see Kel. 136.

(*f*) Mackally's case, 9 Co. 69.

(*g*) Pew's case, Cro. Car. 183. 1 Hale 458.

(*h*) Fost. 310, 311.

As to notice by officers interposing in the case of riots and affrays.

With regard to such ministers of justice as, in right of their offices, are conservators of the peace, and in that right alone interpose in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties engaged should have some notice of the intent with which they interpose; for the reason which was mentioned in relation to private persons; lest the parties engaged should, in the heat and bustle of an affray, imagine that they come to take a part in it (*i*). But, in these cases, a small matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer, in any other manner, declare with what intent he interposes. Or if the officer be within his proper district, and known, or but generally acknowledged, to bear the office he assumes, the law will presume that the party killing had due notice of his intent; especially, if it be in the day time. (*k*) In the night some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient. (*l*) The saying of a learned judge, "that a constable's staff will not make a constable," is admitted to be true: but if a minister of justice be present at a riot or affray within his district, and in order to keep the peace produce his staff of office, or any other known ensign of authority, it is conceived that this will be a sufficient notification of the intent with which he interposes; and that, if resistance be made after this notification, and he or any of his assistants killed, it will be murder in every one who joined in such resistance. (*m*) For it seems, that in the case of a

(*i*) Fost. 310. Kel. 66. 115.

(*k*) 1 Hale 460, 461. Fost. 310, 311. So in the case of Sissinghurst-house, 1 Hale 462, 463, it was resolved, that there was sufficient notice that it was the constable before the man was killed:—1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, viz. that he came with the justice's warrant. 3. Because, after his retreat, and before the man slain, he commanded the peace, and, notwithstanding, the rioters fell on and killed the party. See the case fully stated, *ante*, 665, *et sequ.*

(*l*) 1 Hale 461. Fost. 311.

(*m*) Fost. 311.

public bailiff, a bailiff juratus et cognitus, acting in his own district, his authority is considered as a matter of notoriety; and upon this ground, though the warrant by which he was constituted bailiff be demanded, he need not shew it; (*n*) and it is sufficient if he notify that he is the constable, and arrest in the king's name. (*o*) And this kind of notification by implication of law will hold also in cases where public officers, having warrants, directed to them as such, to execute, are resisted, and killed in the attempt. (*p*) Thus, where a warrant had been granted against the prisoner by a justice of peace for an assault, and directed *to the constable of Pattishal*, and delivered by the person who had obtained it to the deceased, to execute, as constable of the parish, and it appeared that the deceased went to the prisoner's house in the day time to execute the warrant, had his constable's staff with him, and gave notice of his business, and further, that he had before acted as constable of the parish, and was generally known as such; it was determined that this was sufficient evidence and notification of the deceased being constable, although there were no proof of his appointment, or of his being sworn into the office. (*q*)

To what persons in an affray notice shall be held to extend; and of notice in the case of third persons interposing.

It is laid down in one case, that if, upon an affray, the constable, or others in his assistance, come to suppress it, and preserve the peace, and be killed in executing their office, it is murder in law, although the murderer knew not the party killed, and though the affray were sudden; be-

(*n*) 1 Hale 458, 461, 583. Mackally's case, 9 Co. 69, a. But it is otherwise as to the writ or process against the party. Both a public and private bailiff, where the party submits to the arrest and demands it, are bound to shew at whose suit, for what cause, and out of what court the process issues, and where returnable. 5 Co. 54, a. 9 Co. 69, a. But in no case is the bailiff required to part with the possession of the warrant; neither is a constable, whether acting within or without his jurisdiction. 1 MS. Sum. 250. 1 East. P. C. c. 5. s. 84. p. 319.

(*o*) 1 Hale 583.

(*p*) 1 East. P. C. c. 5. s. 81. p. 315.

(*q*) Gordon's case, *Northampton* Spr. Ass. 1789, *cor.* Thomson, B. afterwards considered at a conference of all the judges, 26th June, 1789. See 1 East. P. C. c. 5. s. 81. p. 315.

cause he set himself against the justice of the realm. (*r*) It is said, however, that, in order to reconcile this with other authorities, it seems that the party killing must have had *implied notice* of the character in which the peace officer and his assistants interfered, though not a personal knowledge of them. (*s*) For it is elsewhere laid down, that if there be a sudden affray, and the constable come in, and, endeavouring to appease it, be killed by one of the company who knew him, it is murder in the party killing, and in such of the others as knew the constable, and abetted the party in the fact; but only manslaughter in those who knew not the constable: (*t*) and that others continuing in the affray, neither knowing the constable nor abetting to his death, would not be guilty even of manslaughter. (*u*) But these positions do not apply to an affray deliberately engaged in by parties determined to make common cause, and to maintain it by force. (*w*)

It is however agreed, that if a bailiff, or other officer, be resisted in the regular discharge of his duty in executing process against a party, and a third person, even the servant or friend of the party resisting, come in and take part against the officer, and kill him, it will be murder, though he knew him not. (*x*) But it is suggested, that, in this case, in order to make it murder in the servant or friend, the party whom they came in to assist must have had due notice of the officer's authority; and that if the offence would not have been murder in the party himself resisting for want of such notice, neither would it in the servant or friend under the like ignorance. (*y*) The law upon this point may, perhaps, hardly seem to be reconcileable with that above-men-

(*r*) Young's case, 4 Co. 40, b. 3 Inst. 52.

(*s*) 1 East. P. C. c. 5. s. 82. p. 316.

(*t*) 1 Hale 438, 446, 461. Kel. 115, 116.

(*u*) 1 Hale 446. Lord Hale adds, *quod tamen quære*, but (as it is said 1 East. P. C. c. 5. s. 82. p. 316.) perhaps over cautiously, if in truth there were no abetment.

(*w*) See as to cases of that kind, *ante*, p. 31, 32.

(*x*) 1 Hawk. P. C. c. 31. s. 57. Keb. 87. 4 Co. 40. b. 1 East. P. C. c. 5. s. 82. p. 316.

(*y*) 1 East. P. C. c, 5. s. 82. p. 316.

tioned, of a person not knowing the constable, and killing him in an affray; but it is defended on the principle, that every person wilfully engaging, in cool blood, in a breach of the peace, by assaulting another instead of endeavouring to assuage the dispute, is bound first to satisfy himself of the justice of the cause he espouses at his peril. (*z*) And, upon this principle, if a stranger, seeing two persons engaged, one of them a bailiff attacking the other with a sword and the other resisting an arrest by such bailiff, interfere between them without knowing the bailiff, for the express purpose of defending the party attacked against the bailiff, he must abide the consequences at his peril; but if he interfere, not for the purpose of aiding one party against the other, but *with intent only to preserve the peace and prevent mischief*, and in so doing happen to kill the bailiff, the case would possibly fall under a different consideration. (*a*)

Notice before doors are broken open.

In all cases, whether criminal or civil, where doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity. (*b*) The question as to what should be considered as due notice, was much considered in a case where two officers went to the workshop of a person, against whom they had an escape warrant, and, finding the shop door shut, called out to the person, and informed him that they had an escape warrant against him, and required

(*z*) 1 Hawk. P. C. c. 31. s. 59. 1 East. P. C. c. 5. s. 82. p. 316, 317, where the grounds upon which the law in each of these cases may be supported, and considered as reconcileable, are more fully stated.

(*a*) See the case of Sir C. Standlie and Andrews, Sid. 159, where Andrews, under similar circumstances, was holden not to be guilty of murder. This case is differently reported by Kelyng; and Keble, reporting the same case very shortly, says,—It was adjudged, that if any casually assist against the law, and kill the bailiff, it is murder, especially if he knew the cause. 1 Keb. 584. and see 1 East. P. C. c. 5. s. 83. p. 318.

(*b*) Fost. 320. 2 Hawk. P. C. c. 14. s. 1.

him to surrender, otherwise they said they would break open the door; and upon the person's refusing to surrender, they broke open the door, and one of their assistants was immediately killed. Nine of the judges were of opinion, that no precise form of words was required in a case of this kind; and that it is sufficient if the party has notice that the officer comes not as a mere trespasser, but claiming to act under a proper authority. The judges who differed, thought that the officers ought to have declared, in an explicit manner, what sort of warrant they had; and that an escape does not, ex vi termini, nor in the notion of law, imply any degree of force, or breach of the peace; and, consequently, that the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and that for want of this due notice, the officers were not to be considered as acting in discharge of their duty, but as mere trespassers. (*c*)

Notice by private bailiff.

In the case of a *private or special bailiff*, either it must appear that the party knew that he was such officer, as where the party said, "Stand off, I know you well enough; come at your peril;" or, that there was some such notification thereof that the party might have known it, as by saying, "I arrest you." These words, or words to the like effect, give sufficient notice; and if the person using them be a bailiff, and have a warrant, the killing of such officer will be murder. (*d*) A private bailiff ought also to shew the warrant upon which he acts, if it is demanded: (*e*) and with respect to the writ or process against the party, both the public and private bailiff, in case the party submit to the arrest and make the demand, are bound to shew at whose suit, and for

(*c*) Curtis's case, Fost. 136, 137.

(*d*) 1 Hale 461. Mackally's case, 9 Co. 69, b.

(*e*) 1 Hale 583. That is, the warrant by which he is constituted bailiff; which a bailiff or officer, juratus et cognitus, need not shew upon the arrest, 1 Hale 458. And see 1 Hale 459, where it is said that a justice of peace may issue his warrant to a private person; but then such person must shew his warrant, or signify the contents of it.

what cause, the arrest is made, out of what court the process issues, and when and where returnable. (*f*) In no case, however, is he required to part with the warrant out of his own possession; for that is his justification. (*g*)

As to the regularity of the proceeding.

It may be observed generally, that where an officer, in executing his office, proceeds irregularly, and exceeds the limits of his authority, the law gives him no protection in that excess; and if he be killed, the offence will amount to no more than manslaughter in the person whose liberty is so invaded. (*h*) He should be careful, therefore, to execute process only within the jurisdiction of the court from whence it issues; as, if it be executed out of such jurisdiction, the killing the officer attempting to enforce the execution of it, will be only manslaughter. (*i*) But if the process be executed within the jurisdiction of the court or magistrate from whence it is issued, it will be sufficient, though it be executed out of the vill of the constable, provided it be directed to a particular constable by name, or even by his name of office. (*k*) And the officer must also be careful not to make an arrest on a *Sunday*, except in cases of treason, felony, or breach of the peace; as, in all other cases, an arrest on that day will be the same as if done without any authority. (*l*) But process may be executed in the night time, as well as by day. (*m*)

Right of officers to break open windows or doors to make an arrest.

The right of officers to break open windows or doors, in order to make an arrest, has been a subject of some litigation; but many of the points have been settled, and require

(*f*) 1 Hale 458, note (*g*). 5 Co. 54, *a*. 9 Co. 69, *a*.

(*g*) 1 East. P. C. c. 5. s. 83. p. 319.

(*h*) Fost. 312.

(*i*) 1 Hale 458, 459. 1 East. P. C. c. 5. s. 80. p. 314.

(*k*) 1 Hale 459. 2 Hawk. P. C. c. 13. s. 27, 30. 1 East. P. C. c. 5. s. 80. p. 314.

(*l*) 29 Car. II. c. 7. 1 East. P. C. c. 5. s. 88. p. 324, 325. The statute makes void all process, warrants, &c. served and executed on a Sunday, except in the cases mentioned in the text.

(*m*) 9 Co. 66, a. 1 Hale 457. 1 Hawk. P. C. c. 31. s. 62.

to be shortly noticed. In the first place, however, it may be observed as a general rule, that in every case, whether criminal or civil, in which doors may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter on the one hand, and a refusal on the other, before the parties proceed to that extremity. (*n*)

Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand, and refusal, which have been mentioned. (*o*) So, where a minister of justice comes armed with process, founded on a breach of the peace, doors may be broken. (*p*) And it is also settled, upon unquestionable authorities, that where an injury to the public has been committed, in the shape of an insult to any of the courts of justice, on which process of contempt is issued, the officer charged with the execution of such process may break open doors if necessary, in order to execute it. (*q*) And the officer may act in the same manner upon a capias utlagatum, or capias pro fine, (*r*) or upon an habere facias possessionem. (*s*) The same force may be used where a forcible entry or detainer is found by inquisition before justices of peace, or appears upon their view; (*t*) and also where the proceeding is upon a warrant of a justice of peace, for levying a penalty on a conviction grounded on

(*n*) Fost. 320. 2 Hawk. P. C. c. 14. s. 1. 1 East. P. C. c. 5. s. 87. p. 324.

(*o*) Fost. 320. 1 Hale 459. And see 2 Hawk. P. C. c. 14. s. 7. where it is said that doors may be broken open, where one known to have committed a treason or felony, or to have given another a dangerous wound, is pursued, either with or without a warrant, by a constable or private person.

(*p*) Fost. 320. 1 Hale 459. 2 Hawk. P. C. c. 14. s. 3. Curtis's case, Fost. 135.

(*q*) Burdett *v.* Abbott, 14 East. 157. where the process of contempt proceeded upon the order of the House of Commons; and see Semaynes' case, Cro. Eliz. 909. and Brigg's case, 1 Rol. Rep. 336.

(*r*) 1 Hale 459. 2 Hawk. P. C. c. 14. s. 4.

(*s*) 1 Hale 458. 5 Co. 95, b.

(*t*) 2 Hawk. P. C. c. 14. s. 6. *ante*, 425.

any statute, which gives the whole or any part of such penalty to the king. (*u*) But in this latter case the officer executing the warrant must, if required, shew the same to the person whose goods and chattels are distrained, and suffer a copy of it to be taken. (*w*).

But though a felony has been actually committed; yet a bare suspicion of guilt against the party will not authorize a proceeding to this extremity, unless the officer comes armed with a warrant from a magistrate, grounded on such suspicion. (*x*) For where a person lies under a probable suspicion only, and is not indicted, (*y*) it is said to be the better opinion, that the breaking open doors without a warrant, in order to apprehend him, cannot be justified: (*z*) or must at least be considered as done at the peril of proving that the party, so apprehended on suspicion, is guilty. (*a*) But a different doctrine appears to have formerly prevailed upon this point; by which it was held that if there were a charge of felony laid before the constable, and reasonable ground of suspicion, such constable might break open doors, though he had no warrant. (*b*)

It is said, that if there be an affray in a house, the doors of which are shut, whereby there is likely to be manslaughter or bloodshed, and the constable demand entrance, and be refused by those within, who continue the affray, the constable may break open the doors to keep the peace, and prevent the danger: (*c*) and it is also said, that if there be disorderly drinking or noise in a house at an unseasonable time of night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disor-

(*u*) 2 Hawk. P. C. c. 14. s. 5.
(*w*) 27 Geo. II. c. 20.
(*x*) Fost. 321.
(*y*) *Ante*, 724, 725.
(*z*) 2 Hawk. P. C. c. 14. *s*. 7.
(*a*) 1 East. P. C. c. 5. s. 87. p. 322.
(*b*) 1 Hale 583. 2 Hale 92. 18 Ed. IV. 9, a.
(*c*) 2 Hale 95.

der. (*d*) And further, that where an affray is made in a house in the view or hearing of a constable, or where those who have made an affray in his presence fly to a house, and are immediately pursued by him, and he is not suffered to enter in order to suppress the affray in the first case, or to apprehend the affrayers in either case, he may justify breaking open the doors. (*e*)

In civil cases a man's house is his castle

But this mode of proceeding, by breaking the doors of the party, is founded upon the necessity of the measure for the public weal, and is not permitted to the particular interest of an individual. In civil suits, therefore, the principle that a man's house is his castle, for safety and repose to himself and his family, is admitted; and, accordingly, in such cases, an officer cannot justify the breaking open an outward door or window to execute the process. (*f*) If he do so, he will be a trespasser; and if the occupier of the house resist him, and in the struggle kill him, the offence will be only manslaughter; (*g*) or if the occupier of the house do not know him to be an officer, and have reasonable ground of suspicion that the house is broken with a felonious intent, the killing such officer will be no felony. (*h*)

It has been considered, however, that this rule of every man's house being his castle has been carried as far as the true principles of political justice will warrant, and that it will not admit of any extension. (*i*) It should be observed, therefore, that it will apply only to the breach of *outward* doors or windows; to a breach of the house for the purpose of arresting *the occupier or any of his family;* and to arrests *in the first instance.*

(*d*) 2 Hale 95. and it is added, "This is constantly used in London and Middlesex." But see *ante*, 392, 393.

(*e*) 2 Hawk. P. C. c. 14. s. 8.

(*f*) Cook's case, Cro. Car. 537.

(*g*) *Id. Ibid.*

(*h*) 1 Hale 458. 1 East. P. C. c. 5. s. 87. p. 321, 322.

(*i*) Fost. 319, 320.

The privilege of every man's house being his castle, applies only to the breach of *outward doors.*

Outward doors or windows are such as are intended for the security of the house, against persons from without endeavouring to break in. (*k*) These are protected by the privilege which has been before mentioned: but if the officer find the outward door open, or it be opened to him from within, he may then break open any *inward* door, if he find that necessary in order to execute his process. (*l*) Thus, it has been holden that an officer, having entered peaceably at the outer door of a house, was justified in breaking open the door of a lodger, who occupied the first and second floors, in order to arrest such lodger. (*m*) But it seems that if the party, against whom the process is issued, *be not within the house* at the time, the officer can only justify breaking open inner doors in order to search for him, after having first demanded admittance. (*n*) Though in case the person, or the goods of the defendant, are contained in the house which the officer has entered, he may break open any door within the house without any further demand. (*o*) If, however, the house is the house of a stranger, and not of the defendant, the officer must be careful to ascertain that the person or the goods (according to the nature of the process) of the defendant are within, before he breaks open any inner door; as if they are not, he will not be justified. (*p*)

In a case where an outward door was in part open (being divided into two parts, the lower hatch of which was closed, and the upper part open) and the officer put his arm over the hatch, to open the part which was closed, upon which a struggle ensued between him and a friend of the prisoner, and, the officer prevailing, the prisoner shot at and killed him; it was held to be murder. (*q*)

(*k*) Fost. 320.

(*l*) 1 Hale 458. 1 East. P. C. c. 5. s. 87. p. 323.

(*m*) Lee *v.* Gansel, Cowp. 1.

(*n*) Ratcliffe *v.* Burton, 3 Bos. and Pull. 223.

(*o*) Per Gibbs, J. in Hutchinson *v.* Birch and another, 4 Taunt. 619.

(*p*) Cooke *v.* Birt, 5 Taunt. 765. Johnson *v.* Leigh, 6 Taunt. 240. *Post.* 748.

(*q*) Baker's case, 1 Leach. 112.

And to cases where the house is broken, in order to arrest *the occupier, or any of his family.*

This personal privilege of an individual, in respect to his outer door or window, is confined also to cases where the breach of the house is made in order to arrest *the occupier or any of his family*, who have their domicile, their ordinary residence there: for if a stranger, whose ordinary residence is elsewhere, upon a pursuit, take refuge in the house of another, this is not the castle of such stranger, nor can he claim in it the benefit of sanctuary. (*r*) But it should be observed, that in all cases where the doors of strangers are broken open, upon the supposition of the person sought being there, it must be at the peril of finding him there; unless, as it seems, where the parties act under the sanction of a magistrate's warrant. (*s*) And an officer cannot even enter the house of a stranger, though the door be open, for the purpose of taking the goods of a defendant, but at his peril as to the goods being found there or not; and if they be not found there, he is a trespasser. (*t*) And it has been decided that a sheriff cannot justify breaking the inner doors of the house of a stranger, *upon suspicion* that a defendant is there, in order to search for such defendant, and arrest him on mesne process. (*u*).

And also, to *arrests in the first instance.*

And the privilege is also confined to *arrests in the first instance.* For if a man, being legally arrested, (*w*) escape from the officer, and take shelter, though in his own house, the officer may, upon fresh suit, break open doors in order

1 East. P. C. c. 5. s. 87. p. 323. It should be observed, that in this case there was proof of a previous resolution in the prisoner to resist the officer, whom he afterwards killed in attempting to attach his goods in his dwelling house, in order to compel an appearance in the county court. The point reserved related to the legality of the attachment.

(*r*) Fost. 320. 5 Co. 93.

(*s*) 2 Hale 103. Fost. 321. 1 East. P. C. c. 5. s. 87. p. 324.

(*t*) Cooke *v.* Birt, 5 Taunt. 765.

(*u*) Johnson *v.* Leigh, 6 Taunt. 246. *Ante*, 747.

(*w*) Laying hold of the prisoner, and pronouncing the words of arrest, is an actual arrest. Fost. 320. But bare words will not make an arrest: the officer must actually touch the prisoner. Genner *v.* Sparkes, 1 Salk. 79.

to retake him, having first given due notice of his business, and demanded admission, and been refused. (*x*) If it be not, however, upon fresh pursuit, it seems that the officer should have a warrant from a magistrate: and it should be observed, that the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. (*y*) Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned again with assistants, who attempted to force the door, when the party within shot one of the assistants; it was ruled to be only manslaughter. (*z*)

In all cases where the officer or his assistants, having entered a house in the execution of their duty, are locked in, they may justify breaking open the doors to regain their liberty. (*a*)

Interference by third persons, where the arrest is illegal.

It has been deemed a question worthy of great consideration how far *third persons*, *especially mere strangers*, interposing in behalf of a party illegally arrested, are entitled to insist upon the illegality of the arrest, in their defence, as extenuating their guilt in killing the officer.

Tooley's case.

The point was raised in the following case:—One Bray, who was a constable of St. Margaret's parish in Westminster, came into the parish of St. Paul Covent Garden, where he was no constable, and consequently had no authority;(*b*) and there took up one Ann Dekins, under suspicion of being a disorderly person, but who had not misbehaved her-

(*x*) Fost. 320. Genner *v.* Sparkes, 1 Salk. 79. 1 Hale 459. 2 Hawk. P. C. c. 14. s. 9.

(*y*) 1 East. P. C. c. 5. s. 87. p. 324.

(*z*) Stevenson's case, 10 St. Tr. 462.

(*a*) 2 Hawk. P. C. c. 14. s. 11. 1 East. P. C. c. 5. s. 87. p. 324.

(*b*) One judge only thought that Bray acted with authority, as he shewed his staff, and that, with respect to the prisoners, he was to be considered as constable *de facto*.

self, and against whom Bray had no warrant. The prisoners came up; and, though they were all strangers to the woman, drew their swords, and assaulted Bray, for the purpose of rescuing the woman from his custody; upon which he shewed them his constable's staff, declared that he was about the queen's business, and intended them no harm. The prisoners then put up their swords; and Bray carried the woman to the round house in Covent Garden. A short time afterwards, the woman being still in the round house, the prisoners drew their swords again, and assaulted Bray, on account of her imprisonment, and to get her discharged. Bray called some persons to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners: upon which a person named Dent came to his assistance; and before any stroke received, one of the prisoners gave Dent, while assisting the constable, a mortal wound. This case was elaborately argued; and the judges were divided in opinion; seven of them holding, that the offence was manslaughter only, and five that it was murder. (*c*) The seven judges who held that it was manslaughter thought that it was a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue her who was unlawfully restrained of her liberty; and that it could not be murder, if the woman was unlawfully imprisoned: (*d*) and they also thought that the prisoners, in this case, had sufficient provocation; on the ground that if one be imprisoned upon an unlawful authority it is a sufficient provocation to all people, out of compassion, and much more where it is done under a colour of justice; and that, where the liberty of the subject is invaded, it is a provocation to all the subjects of England. But the five judges who differed thought that, the woman being a stranger to the prisoners, it could not be a provocation to them; otherwise, if she had been a friend or

(*c*) Tooley and Others (case of) 2 Lord Raym. 1296.

(*d*) For this Young's case, 4 Co. 40. was cited; and Mackally's case, 9 Co. 65.

servant; and that it would be dangerous to allow such a power of interference to the mob.

The case of Hugget, and also that of Sir Henry Ferrers, appear to have been relied upon in support of the argument of the seven judges, who in the preceding case held the offence to be manslaughter. Hugget's case, in the fuller report of it, (*e*) appears to have been thus:—Berry and two others pressed a man without any warrant for so doing; to which the man quietly submitted, and went along with them. The prisoner with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry shewed them a paper, which the prisoner and his associates said was no warrant, and immediately drew their swords to rescue the impressed man, and thrust at Berry: whereupon Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. But this case is stated very differently by Lord Hale, as having been under the following circumstances:—A press-master seized B. for a soldier; and, with the assistance of C., laid hold of him. D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C.: and by the advice of all the judges, except very few, it was ruled that this was but manslaughter. (*f*) The case of Sir Henry Ferrers was only this:—That Sir Henry Ferrers being arrested for debt, upon an illegal warrant, his servant, in seeking to rescue him, as was pretended, killed the officer; but, upon the evidence, it appeared clearly, that Sir Henry Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant; wherefore he was found not guilty of the murder and manslaughter. (*g*)

Hugget's case.

Sir H. Ferrers's case.

But Mr. Justice Foster is of opinion, that these cases of Hugget and Sir Henry Ferrers's servant did not warrant

(*e*) Hugget's case, Kel. 59.

(*f*) 1 Hale 465.

(*g*) Sir Henry Ferrers's case, Cro. Car. 371.

the doctrine laid down by the seven judges in the case of Tooley: and this great master of the crown law (*h*) has animadverted upon that doctrine with much force, viewing it as having carried the law in favour of private persons officiously interposing in cases of illegal arrest further than sound reason, founded in the principles of true policy, will warrant. (*i*) After observing, that, in Hugget's case, swords were drawn, a mutual combat ensued, the blood was heated before the mortal wound was given, and a rescue seemed to be practicable at the time the affray began; (*k*) whereas, though in Tooley's case, the prisoners had, at the first meeting, drawn their swords against the constable unarmed, they had put them up again, appearing to be pacified, and cool reflection seeming to have taken place; and it was at the second meeting that the deceased received his death wound, before a blow was given or offered by him or any of his party, and also in that case there was no possibility of rescue, the woman having been secured in the round house; he says, that the second assault on the constable seems rather to have been grounded upon resentment, or a principle of revenge, for what had before passed, than upon any hope or endeavour to assist the woman. He then proceeds, "Now what was "the case of Tooley and his accomplices, stript of a pomp "of words, and the colourings of artificial reasoning? They "saw a woman, for aught appears, a perfect stranger to "them, led to the round house under a charge of a criminal nature. This, upon evidence at the Old Bailey, a "month or two afterwards, comes out to be an illegal arrest "and imprisonment, a violation of magna charta; and "these ruffians are presumed to have been seized, all on a "sudden, with a strong fit of zeal for magna charta (*l*) and

(*h*) So called by Mr. J. Blackstone, 4 Com. 2.

(*i*) Fost. 312, *et sequ.*

(*k*) In Hugget's case the judges, who held it to be manslaughter, put the point upon an endeavour to rescue.

(*l*) Holt, C. J. in delivering the judgment in Tooley's case, said, "Sure a man ought to be concerned "for magna charta and the laws; "and if any one against the law "imprison a man, he is an offender against magna charta."

"the laws; and in this frenzy to have drawn upon the con-
"stable, and stabbed his assistant. It is extremely difficult
"to conceive that the violation of magna charta, a fact of
"which they were totally ignorant at that time, could be the
"provocation which led them into this outrage. But, ad-
"mitting for argument sake that it was, we all know that
"words of reproach, how grating and offensive soever, are
"in the eye of the law no provocation in the case of volun-
"tary homicide: and yet every man who hath considered
"the human frame, or but attended to the workings of his
"own heart, knows that affronts of that kind pierce deeper,
"and stimulate the veins more effectually, than a slight in-
"jury done to a third person, though under colour of justice,
"possibly can. The indignation that kindles in the breast
"in one case is instinct, it is human infirmity; in the other
"it may possibly be *called* a concern for the common rights
"of the subject: but this concern, when well founded, is
"rather founded in reason and cool reflection, than in human
"infirmity; and it is to human infirmity alone that the law
"indulges in the case of a sudden provocation." He then proceeds further: "But if a passion for the common rights
"of the subject, in the case of individuals, must, against all
"experience, be presumed to inflame beyond a personal
"affront, let us suppose the case of an upright and deserving
"man, universally beloved and esteemed, standing at the
"place of execution, under a sentence of death manifestly
"unjust. This is a case that may well rouse the indigna-
"tion, and excite the compassion, of the wisest and best
"men: but wise and good men know that it is the duty of
"private subjects to leave the innocent man to his lot, how
"hard soever it may be, without attempting a rescue; for
"otherwise all government would be unhinged. And yet,
"what proportion doth the case of a false imprisonment, for
"a short time, and for which the injured party may have an
"adequate remedy, bear to that I have now put." (*m*)

(*m*) Fost. 315, 316, 317.

Adey's case.

In a more recent case, the prisoner, who cohabited with a person named Farmello, killed an assistant of a constable, who came to apprehend Farmello, as an idle disorderly person, under the statute 19 G. II. c. 10. Farmello, though he was not an object of the act, did not himself make any resistance to the arrest; but the prisoner, immediately upon the constable and his assistant requiring Farmello to go along with them, without making use of any argument to induce them to desist, or saying one word to prevent the intended arrest, stabbed the assistant. And Hotham, B., with whom Gould, J. and Ashhurst, J. concurred, held the offence to be murder: a special verdict, however, was found; (*n*) and the case was argued in the Exchequer chamber, before ten of the judges; but no opinion was ever publicly delivered. (*o*)

SECTION V.

CASES WHERE THE KILLING TAKES PLACE IN THE PROSECUTION OF SOME OTHER CRIMINAL, UNLAWFUL, OR WANTON ACT.

Heedless and incautious acts.

It has been shewn, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original inten-

(*n*) The court advised the jury to find a special verdict, on the ground of the difference of opinion which had been entertained in Tooley's case, and the case of Hugget, *ante*, 749. 751.

(*o*) Adey's case, 1 Leach 206. And see *id.* p. 212. where it is said, that the prisoner laid eighteen months in gaol, and was then discharged:—but the following note is added, "It is said, that the judges "held it to be manslaughter only, "but no opinion was ever pub- "licly given; and quære whether "the prisoner did not escape pend- "ing the opinion of the judges, "when the gaol was burnt down "in 1780, and was never retaken." And see also 1 East. P. C. c. 5. s. 89. page 329. note (*a*), where it is said, "Upon inquiry, however, it ap- "pears that, pending the consider- "ation of the case by the judges, "she escaped during the riots in "1780, and was never retaken."

tion of the party, it will be murder: (*p*) and it may be here observed, that if such deliberation and mischievous intention does not appear, (which is matter of fact, and to be collected from circumstances,) and the act was done heedlessly and incautiously, it will be manslaughter. (*q*)

Blow aimed at one person kills another.

Where an injury, intended against one person, mortally affects another, as where a blow aimed at one person lights upon another and kills him, the inquiry will be whether, if the blow had killed the person against whom it was aimed, the offence would have been murder or manslaughter. For if a blow, intended against A., and lighting on B., arose from a sudden transport of passion, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B. (*r*)

Acts generally incautious.

There are many acts so heedless and incautious as necessarily to be deemed unlawful and wanton, though there may not be any express intent to do mischief: and the party committing them, and causing death by such conduct, will be guilty of manslaughter. As if a person, breaking an unruly horse, ride him amongst a crowd of people, and death ensue from the viciousness of the animal, and it appear clearly to have been done heedlessly and incautiously only, and not with an intent to do mischief, the crime will be manslaughter. (*s*) But it is said, that in such a case it would be murder, if the rider had intended to divert himself with the fright of the crowd. (*t*) And if a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house or wall, and a person be thereby killed, this will be manslaughter, though there were no intent to do hurt to any one; because the act itself was unlawful. (*u*)

(*p*) *Ante*, 658, *et seqq.*
(*q*) Fost. 261.
(*r*) Fost. 262.
(*s*) 1 East. P. C. c. 5. s. 18. p. 231.
(*t*) 1 Hawk. P. C. c. 31. s. 68.
(*u*) 1 Hale 475. 1 Hawk. P. C. c. 29. s. 9.

So where a gentleman came to town in a chaise, and, before he got out of it, fired his pistols in the street, which, by accident, killed a woman, it was ruled manslaughter; for the act was likely to breed danger, and manifestly improper. (*w*)

Death from acts of trespass.

It has been shewn that where death ensues from an act done in the prosecution of a felonious intention, it will be murder: (*x*) but a distinction is taken in the case of an act done with the intent only of committing a bare trespass; as if death ensues from such act, the offence will be only manslaughter. (*y*) Thus, though if A. shoot at the poultry of B., intending to steal them, and by accident kill a man, it will be murder; yet, if he shoot at them wantonly, and without any such felonious intention, and accidentally kill a man, the offence will be only manslaughter. (*z*) And any one who voluntarily, knowingly, and unlawfully, intends hurt to the person of another, though he intend not death, yet, if death ensue, is guilty of murder or manslaughter, according to the circumstances of the nature of the instrument used, and the manner of using it, as calculated to produce great bodily harm or not. (*a*). And if a man be doing an unlawful act, though not intending bodily harm to any one, as if he be throwing a stone at another's horse, and hit a person and kill him, it is manslaughter. (*b*) But it seems that in cases of this kind the guilt would rather depend upon one or other of these circumstances, either that the act might probably breed danger, or that it was done with a mischievous intent. (*c*)

Death happening at unlawful sports.

Where sports are unlawful in themselves, or productive of danger, riot, or disorder, so as to endanger the peace, and death ensue in the pursuit of them, the party killing is

(*w*) Burton's case, 1 Str. 481.

(*x*) *Ante*, 660, 661.

(*y*) Fost. 258. Though Lord Coke seems to think otherwise, 3 Inst. 56.

(*z*) Fost. 258, 259. 1 Hale 475.

(*a*) 1 East. P. C. c. 5. s. 32. p. 256, 257. 1 Hale 39.

(*b*) 1 Hale 39.

(*c*) 1 East. P. C. c. 5. s. 32. p. 257.

guilty of manslaughter. (*d*) Such manly sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, are not, however, deemed unlawful sports: (*e*) but prize-fighting, public boxing matches, or any other sports of a similar kind, which are exhibited for lucre, and tend to encourage idleness by drawing together a number of disorderly people, have met with a different consideration. (*f*) For in these last-mentioned cases the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward or applause be obtained: and meetings of this kind have also a strong tendency in their nature to a breach of the peace. (*g*) Therefore, where the prisoner had killed his opponent in a boxing match, it was holden that he was guilty of manslaughter; though he had been challenged to fight by his adversary for a public trial of skill in boxing, and was also urged to engage by taunts; and the occasion was sudden. (*h*)

The custom of cock-throwing at Shrovetide has been considered as an idle, dangerous, and unlawful sport; and accordingly, where a person throwing at a cock missed his aim and killed a child who was looking on, Mr. J. Foster ruled it to be manslaughter; and speaking of the custom, he says, "it is a barbarous unmanly custom, frequently productive "of great disorders, dangerous to the by-standers, and "ought to be discouraged." (*i*) So throwing stones at another wantonly in play, being a dangerous sport without the least appearance of any good intent, or doing any other such idle action as cannot but endanger the bodily hurt of some one or other, and by such means killing a person, will be manslaughter. (*k*)

(*d*) Fost. 259, 260. 1 East. P. C. c. 5. s. 41. p. 268.

(*e*) Post, Chap. on *Excusable Homicide*.

(*f*) Fost. 260.

(*g*) 1 East. P. C. c. 5. s. 42. p. 270.

(*h*) Ward's case, O. B. 1789, *cor.* Ashhurst, J. 1 East. P. C. c. 5. s. 42. p. 270.

(*i*) Fost. 261.

(*k*) 1 Hawk. P. C. c. 29. s. 5.

Though the sports be not in their nature unlawful; yet, if the weapons used be of an improper and deadly nature, the party killing will be guilty of manslaughter: as was the case of Sir John Chichester, who unfortunately killed his man-servant as he was playing with him. Sir John Chichester made a pass at the servant with a sword in the scabbard, and the servant parried it with a bed-staff, but in so doing struck off the chape of the scabbard, whereby the end of the sword came out of the scabbard; and the thrust not being effectually broken, the servant was killed by the point of the sword. (*l*) This was adjudged manslaughter: and Mr. J. Foster thinks, in conformity with Lord Hale, that it was rightly so adjudged; on the ground that there was evidently a want of common caution in making use of a deadly weapon in so violent an exercise, where it was highly probable that the chape might be beaten off, which would necessarily expose the servant to great bodily harm. (*m*)

Shooting at deer in another's park, without leave, is an unlawful act, though done in sport, and without any felonious intent; and therefore if a bystander be killed by the shot, such killing will be manslaughter. (*n*)

Where several join to do an unlawful act.

It has been shewn, that where a body of persons resolving generally to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays, happen to kill any one in the prosecution of this unlawful purpose, they

(*l*) Sir John Chichester's case, 1 Hale 472, 473. Alleyn 12. Keil. 108.

(*m*) 1 Hale 473. Fost. 260. 1 East. P. C. c. 5. s. 41. p. 269. But see in Hale 473, the following note:—"This seems a very hard case: and "indeed the foundation of it fails; "for the pushing with a sword in "the scabbard, by consent, seems "not to be an unlawful act; for it "is not a dangerous weapon likely "to occasion death, nor did it so "in this case, but by an unforeseen "accident; and therein differs from "the case of justing, or prize-fighting, wherein such weapons are "made use of as are fitted and "likely to give mortal wounds."

(*n*) 1 Hale 475.

will be guilty of murder. (*o*) Yet, in one case, where divers rioters, having forcibly gained possession of a house, afterwards killed a partisan of the person whom they had ejected, as he, in company with a number of others, was endeavouring in the night forcibly to regain the possession, and to fire the house, they were adjudged guilty only of manslaughter. (*p*) It is said, that perhaps it was so adjudged for this reason, that the person slain was so much in fault himself. (*q*)

SECTION VI.

CASES WHERE THE KILLING TAKES PLACE IN CONSEQUENCE OF SOME LAWFUL ACT BEING CRIMINALLY OR IMPROPERLY PERFORMED, OR OF SOME ACT PERFORMED WITHOUT LAWFUL AUTHORITY.

An act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. (*r*) And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.

Officers of justice acting improperly.

Though officers of justice are authorised to execute their duties in a proper and legal manner, notwithstanding any resistance which may be made to them; (*s*) yet they should not come to extremities upon every slight interruption, nor unless there be a reasonable necessity. Therefore, where a collector, having distrained for a duty, laid hold of a maid servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court

(*o*) *Ante*, 661, 662.

(*p*) Drayton Basset, (case of) Crom. 28. 1 Hale 440.

(*q*) 1 Hawk. P. C. c. 31. s. 53.

(*r*) *Ante*, 664, *et sequ.*

(*s*) *Ante*, 652, 665.

held her opposition to the officer to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that he was guilty of manslaughter in so far exceeding the necessity of the case. (*t*)

Case of Tranter and Reason.

There is a case reported in Strange, as a case of manslaughter, which, if the circumstances of it were as stated in that report, does not seem to have been entitled to so favourable a construction. Mr. Lutterel, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent to fetch the attorney's bill, in order, as Lutterel pretended, to have the debt and costs paid. Words arose at the lodgings about civility money, which Lutterel refused to give; and he went up stairs, pretending to fetch money for the payment of the debt and costs, leaving the officer below. He soon returned with a brace of loaded pistols in his bosom, which, at the importunity of his servant, he laid down on the table, saying, "He did not intend to hurt the officers, but he would not be ill used." The officer who had been sent for the attorney's bill, soon returned to his companion at the lodgings; and, words of anger arising, Lutterel struck one of the officers on the face with a walking cane, and drew a little blood. Whereupon both of them fell upon him: *one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them;* and one of them fired one of the pistols at him *while on the ground*, and gave him his death's wound. (*u*) This is reported to have been holden manslaughter, *by reason of the first assault with the cane:* but Mr. Justice Foster thinks it a very extraordinary case, as thus reported; and mentions the following additional circumstances, which are stated in another report. (*w*). 1. Mr. Lutterel had a sword by his side, which, after the affray was over, was found drawn and broken. 2. When Mr. Lutterel laid the pistols on the table, he declared that he brought

(*t*) Goffe's case, 1 Ventr. 216.

(*u*) Tranter and Reason (case of) Stra. 499.

(*w*) 6 St. Tri. 195. 16 St. Tri. (by Howell) 1.

them down, because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to have been wounded in the hand by a pistol shot (for both pistols were discharged in the affray,) and slightly wounded on the wrist by some sharp pointed weapon: and the other was slightly wounded in the hand by a like weapon. 5. The evidence touching Mr. Lutterel's begging for mercy was not, that he was on the ground begging for mercy; but that on the ground he held up his hands, *as if* he was begging for mercy. Upon these facts the chief justice directed the jury, that if they believed Mr. Lutterel endeavoured to rescue himself, which he seemed to think was the case, and which very probably was the case, it would be justifiable homicide in the officers. And as Mr. Lutterel gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to have done if the debt had not been paid, or bail given, he declared it would be no more than manslaughter. (*x*)

Officers of justice acting upon resistance.

Though resistance be made to an officer of justice; yet if the officer kill the party, after the resistance is over, and the necessity has ceased, the crime will at least be manslaughter. (*y*)

Or upon the flight of the party arrested.

Where a felony has been committed, or a dangerous wound given, and the party flies from justice, he may be killed in the pursuit, if he cannot otherwise be overtaken. And the same rule holds, if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is, at least, manslaughter in him who kills him; and the jury ought to enquire, whether it

(*x*) Fost. 293, 294.

(*y*) MS. Burnet 37. 1 East. P. C. c. 5. s. 63. p. 297. And if there were time for the blood to have cooled, it would, it is conceived, amount to murder, *ante*, 642.

were done of necessity or not. (z) In making arrests in cases of misdemeanor and breach of the peace, (with the exception, however, of some cases of flagrant misdemeanors,) it is not lawful to kill the party accused if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and, generally speaking, it will be murder: but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended. (a) In civil suits, if the party against whom the process has issued fly from the officer endeavouring to arrest him, and be killed by him in the pursuit, it has been said that it will be murder. (b) But it is rather to be considered as murder, or manslaughter, as circumstances may vary the case; for if the officer, in the heat of the pursuit, and merely in order to overtake the party, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter, if, in some cases, even to that offence. (c)

Pressing for the sea service.

In cases of pressing for the sea service, if the party fly, the killing by the officer in the pursuit to overtake him will be manslaughter at least, and in some cases murder, according to the rules which govern the case of misdemeanors; paying attention, nevertheless, to those usages which have prevailed in the sea service in this respect, so far as they are authorised by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land. An officer in the impress service put one of his seamen on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects of the impress service on board. The boat steered away in another direction; and the officer pursued

(z) 1 East. P. C. c. 5. s. 67. p. 298.
(a) Fost. 271. 1 East. P. C. c. 5. s. 70. p. 302.
(b) By Lord Hale, 1 Hale 481.
(c) Fost. 271.

in another vessel for three hours, firing several shots at her with a musket loaded with ball for the purpose of hitting the hallyards and bringing the boat to, which was found to be the usual way; and one of the shots unfortunately killed Collyer. The court said, it was impossible for it to be more than manslaughter. (*d*) It is presumed, that this decision proceeded on the ground that the musquet was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt were intended, it was holden to be manslaughter, and the defendant was burned in the hand. (*e*) It may here be observed, however, that by the statutes for the prevention of *smuggling*, it is provided, that if suspected vessels shall not bring to when chaced by any cutter, or other vessel in the service of the navy, having a proper pendant hoisted, or in the service of the customs or excise, having the pendant and ensign hoisted which is used by vessels in such service, the person having the command of such cutter, or other vessel, may shoot at, or into, the vessel not bringing to; after the colours shall have been so hoisted, and a gun fired, by the cutter or other vessel, as a signal. (*f*)

Officer arresting out of his proper district.

Where an officer makes an arrest out of his proper district, or without any warrant or authority, (*g*) and purposely kills the party for not submitting to such illegal arrest, the crime will, generally speaking, be murder: that is, in all cases at least where an indifferent person acting in the like manner, without any such pretence, would be guilty to that extent. (*h*) In the case of private persons using their en-

(*d*) Phillips's case, Cowp. 830.

(*e*) 1 East. P. C. c. 5. s. 75. p. 308.

(*f*) 24 Geo. III. c. 47. s. 23. And if any person is wounded, maimed, or killed, in consequence of such firing, and the commander of the cutter, or other person acting in his aid, is brought before any magistrate on that account, the magistrate is required to admit to bail. And see 47 Geo. III. sess. 2. c. 66. s. 32.

(*g*) *Ante*, 666.

(*h*) 1 East. P. C. c. 5. s. 80. p. 312.

deavours to bring felons to justice, caution must be used to ascertain that a felony has actually been committed, and that it has been committed by the party arrested or pursued upon suspicion; as, if the suspicion be not supported by the fact, the person endeavouring to arrest or imprison, and killing the party in the prosecution of such purpose, will be guilty of manslaughter. (*i*)

Gaolers.

Gaolers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; therefore an assault upon a gaoler, which would warrant him (apart from personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent. (*k*) And if an officer, whose duty it is to execute a sentence of whipping upon a criminal, should be so barbarous as to exceed all bounds of moderation, and thereby cause the party's death, he will at least be guilty of manslaughter. (*l*)

Correction in foro domestico.

Moderate and reasonable correction may properly be given by parents, masters, and other persons, having authority in *foro domestico*, to those who are under their care; but if the correction be immoderate or unreasonable, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances of the case. If it be done with a dangerous weapon, likely to kill or maim, due regard being always had to the age and strength of the party, it will be murder: but if with a cudgel, or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter. (*m*)

(*i*) Fost. 318.

(*k*) 1 East P. C. c. 5. s. 91. p. 331. citing 1 MS. Sum. 145. semb. Pult. 120, 121. And see 1 Hawk P. C. c. 28. s. 13. where it is said, that if a criminal *endeavouring to break the gaol*, assault the gaoler, he may be lawfully killed by him in the affray.

(*l*) 1 Hawk. P. C. c. 29. s. 5.

(*m*) Fost. 262. 1 Hale 454. Keite's case, 1 Ld. Raym. 144.

In the following case the nature of the instrument used, and the probability of its causing death, or great bodily harm, when used in the manner stated in the case, occasioned much doubt. The prisoner having employed her daughter-in-law, a child of ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the right side of the head, on the temple, and caused her death soon afterwards. The stool was of sufficient size and weight to give a mortal blow; but the prisoner did not intend, at the time she threw it, to kill the child. These facts were stated in a special verdict; but the matter was considered of great difficulty, and no opinion was ever delivered by the judges. (*n*) Hazel's case.

In the foregoing case, the counsel for the prisoner cited the following case. A shepherd boy had suffered some of the sheep, which he was employed in tending, to escape through the hurdles of their pen. The boy's master, the prisoner, seeing the sheep get through, ran towards the boy; and taking up a stake that was lying on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which fracture he soon afterwards died. The learned judge, (*o*) in his directions to the jury, after stating that every master had a right moderately to chastise his servant, but that the chastisement must be on just grounds, and with an instrument properly adapted to the purposes of correction, desired them to consider, whether the stake, which, lying on the ground, was the first thing the prisoner saw in the heat of his passion, was or was not, under such circumstances, and in such a situation, an improper instrument. For that the using a weapon from which death is likely to ensue, imports a mischievous disposition; and the law implies that a degree of malice attended the act, which, if death actually happen, will be murder. Therefore, if the Wiggs's case.

(*n*) Hazel's case, 1 Leach 368, *ante*, 638, 639.

(*o*) Nares, J.

jury should think the stake was an improper instrument, they would further consider whether it was probable that it was used with an intent to kill: that if they thought it was, they must find the prisoner guilty of murder; but if they were persuaded it was not done with an intent to kill, the crime would then amount at most to manslaughter. The jury found it manslaughter. (*p*) In this case it is presumed, that the learned judge must be understood as meaning, that if the jury should think the instrument so improper as to be dangerous, and likely to kill or maim, the age and strength of the party killed being duly considered, the crime would amount to murder; as the law would in such case supply the malicious intent; but that if they thought that the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill.

Nature of the provocation considered in a case where a child was killed by the correction of the parent.

Though the correction exceed the bounds of moderation, the court will pay a tender regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument not such as must, in all probability, occasion death, though the party were hurried to great excess. A father, whose son had frequently been guilty of stealing, and who, upon complaints made to him of such thefts, had often corrected the son for them; at length, upon the son being charged with another theft, and resolutely denying it, though proved against him, beat him, in a passion, with a rope, by way of chastisement for the offence, so much that he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge, by whom the father was tried, consulted his colleague in office, and the principal counsel on the circuit,

(*p*) Wiggs's case, *Norfolk* Sum. Assiz. 1784. 1 Leach 378. note (*a*).

who all concurred in opinion, that it was only manslaughter; and so it was ruled. (*q*)

Self's case.—Correction by a system of privation and ill treatment.

Cases may occur in which the correction is not inflicted by means of any active and personal violence, but by a system of privation and ill treatment. The following case seems to be of this nature:—The prisoner, upon his apprentice returning to him from Bridewell, whither he had been sent for misbehaviour, in a lousy and distempered condition, did not take that care of him which his situation required, and which he might have done; the apprentice not having been suffered to lie in a bed on account of the vermin, but being made to lie on the boards for some time without covering, and without common medical care. In this case, the medical persons who were examined were of opinion, that the boy's death was most probably occasioned by his ill treatment in Bridewell, and the want of care when he went home; and they inclined to think, that if he had been properly treated when he came home, he might have recovered. But, though some harsh expressions were proved to have been spoken by the prisoner to the boy, yet there was no evidence of any personal violence having been used by the prisoner: and it was proved that the apprentice had had sufficient sustenance; and the prisoner had a general good character for treating his apprentices with humanity; and had made application to get this boy into the hospital. Under these circumstances, the Recorder left it to the jury to consider whether the death of the boy was occasioned by the ill treatment he received from his master, after returning from Bridewell; and whether that ill treatment amounted to evidence of malice, in which case they were to find him guilty of murder. At the same time they were told, with the concurrence of Mr. Justice Gould and Mr. Baron Hotham, that if they thought otherwise, yet, as it appeared that the prisoner's conduct towards his apprentice was highly blameable and

(*q*) Anon. Worcester Spr. Ass. c. 5. s. 37. p. 261. 1775. Serj. Foster's MS. 1 East. P.C.

improper, they might, under all these circumstances, find him guilty of manslaughter; which they accordingly did. (*r*) And upon the question being afterwards put to the judges, whether the verdict were well found, they all agreed that the prisoner should be burned in the hand and discharged. (*s*)

In a note upon the foregoing case Mr. East says, "I have "been the more particular in stating the ground of the "decision in this case, because Mr. Justice Gould's note of "the case, from whence this is taken, is evidently different "from another report (*t*) of the opinion of the judges in this "case, from whence it might be collected, that there could "be no gradation of guilt in a matter of this sort, where a "master, by his ill conduct or negligence, had occasioned or "accelerated the death of his apprentice, but that he must "either be found guilty of murder or acquitted; a conclusion "which, whether well or ill founded, certainly cannot be "drawn from this statement of the case. The same opinion, "however, is stated, in the Old Bailey Sessions papers, to "have been thrown out by the Recorder in Wade's case." (*u*)

Persons following their common occupations.

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, on account of such negligence. (*w*) Thus, if workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter. (*x*) It was a lawful act, but done in

(*r*) Self's case, O.B. 1770, MS. Gould, J. 1 East. P. C. c. 5. s. 13. p. 226, 227.

(*s*) Easter T. 16 G. III. De Grey, C. J. and Ashhurst, J. being absent.

(*t*) 1 Leach 137.

(*u*) Wade's case, O. B. Feb. 1784, Sess. Pap.

(*w*) Fost. 262. 1 East. P. C. c. 5. s. 38. p. 262.

(*x*) Fost. 262. 1 Hale 475.

an improper manner. It has indeed been said, that if this be done in the streets of London, or other populous towns, it will be manslaughter, notwithstanding such caution be used. (*y*) But this must be understood with some limitation. If it be done early in the morning, when few or no people are stirring, and the ordinary caution be used, the party may be excusable: but when the streets are full, such ordinary caution will not suffice; for, in the hurry and noise of a crowded street, few people hear the warning, or sufficiently attend to it. (*z*).

So if a person, driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. (*a*) Upon this subject the following case is reported:—A. was driving a cart with four horses in the highway at Whitechapel; and he being in the cart, and the horses upon a trot, they threw down a woman, who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracy, J., Baron Bury, and the Recorder Lovel, held this to be only misadventure. But by Holt C. J., if it had been in a street where people usually pass, it had been manslaughter. (*b*) But upon this case the following observations have been made: "It must "be taken for granted from this note of the case, that the "accident happened in an highway *where people did not* "*usually pass*; for otherwise the circumstance of the driver's "being in his cart, and going so much faster than is usual "for carriages of that construction, savoured much of neg- "ligence and impropriety: for it was extremely difficult, "if not impossible, to stop the course of the horses suddenly, "in order to avoid any person who could not get out of the "way in time. And, indeed, such conduct, in a driver of "such heavy carriages, might, under most circumstances,

(*y*) Hull's case, Kel. 40.
(*z*) Fost. 263.
(*a*) Fost. 263.
(*b*) Anon. O. B. 1704. 1 East. P. C. c. 5. s. 38. p. 263.

"be thought to betoken a want of due care, if any, though "but few, persons might probably pass by the same road. "The greatest possible care is not to be expected, nor is it "required; but whoever seeks to excuse himself for having "unfortunately occasioned, by any act of his own, the death "of another, ought at least to shew that he took that care "to avoid it, which persons in similar situations are ac- "customed to do." (*c*)

There is one species of criminal negligence, punishable by the provisions of the statute law, which may be mentioned in this place, though the offence is not made manslaughter. By the 10 Geo. II. c. 31. if any waterman, between Gravesend and Windsor, receive into his boat or barge a greater number of persons than the act allows, and any passenger be then drowned, such waterman being thereof lawfully convicted, is guilty of felony, and liable to be transported as a felon. (*d*)

SECTION VII.

OF THE INDICTMENT AND JUDGMENT.

Indictment.

The indictment for manslaughter differs from the indictment for the higher crime of murder, in the omission of any statement as to malice, and of the conclusion that the party accused did kill and "murder:" and we have seen that a bill of indictment for murder may be converted into one for manslaughter, by striking out such statement and conclusion. (*e*)

(*c*) 1 East. P. C. c. 5. s. 38. p. 263, 264.

(*d*) It has been observed, that this may serve as a caution to stage coachmen and others, who overload their carriages for the sake of lucre, to the great danger of the lives of the passengers; the number of whom are regulated by act of parliament. 1 East. P. C. c. 5. s. 38. p. 264. and see now 50 G. III. c. 48. by which the 28 G. III. c. 57. 30 G. III. c. 36. and 46 G. III. c. 136. are severally repealed, and various new regulations are enacted.

(*e*) *Ante*, 681.

Judgment and punishment.

The offence of manslaughter is felony within the benefit of clergy; the punishment of which was formerly burning in the hand, and forfeiture of goods and chattels. (*f*) But the 19 G. III. c. 74. enacts that where any person shall be convicted of any felony within clergy, for which such person shall be liable to be burned in the hand, it shall and may be lawful for the court, instead of such burning, to impose upon the offender such a moderate pecuniary fine, as to the court, in its discretion, shall seem meet. (*g*) This, however, does not prevent the court from also adjudging the offender to be imprisoned for any term not exceeding a year. (*h*)

But the benefit of clergy is taken away from one species of manslaughter: namely, mortally stabbing another under circumstances within the statute 1 Jac. I. c. 8. which has been treated of in a former part of this chapter. (*i*)

(*f*) 1 Hale 466. 4 Blac. Com. 193.

(*g*) 19 G. III. c. 74. s. 3.

(*h*) *Id.* s. 4. 1 East. P. C. c. 5. s. 4. p. 218.

(*i*) *Ante*, 707. And see 4 Blac. Com. 193. 1 East. P. C. c. 5. s. 4. p. 218.

CHAPTER THE FOURTH.

Of Excusable and Justifiable Homicide.

WE may now properly proceed to treat of such homicide as, not amounting even to manslaughter, must be considered either as excusable or justifiable: excusable when the person, by whom it is committed, is not altogether free from blame; and justifiable when no blame whatever is attached to the party killing.

Excusable Homicide is of two sorts; either per infortunium, by misadventure; or se et sua defendendo, upon a principle of self-defence. The term *excusable* homicide imports some fault in the party by whom it has been committed; but of a nature so trivial that the law excuses such homicide from the guilt of felony, though in strictness it deems it to be deserving of some degree of punishment. It appears to be the better opinion, that the punishment inflicted for this offence was never greater than a forfeiture of the goods and chattels of the delinquent, or a portion of them: (*a*) and, from as early a time as our records will reach, a pardon and writ of restitution of the goods and chattels have been granted as a matter of right, upon payment of the expences of suing them out. At the present time, in order to prevent this expence, it is usual for the judges to permit or direct a general verdict of acquittal in cases where the death has notoriously happened by misadventure, or in self-

(*a*) 4 Blac. Com. 188. The penalty for this offence is said by Sir Edward Coke to have been anciently no less than death, 2 Inst. 148. 315. but this is denied by other writers, 1 Hale P. C. 425. 1 Hawk. P. C. c. 29. s. 20, *et seqq.* Fost. 282.

defence. (*b*) There may, however, be cases so bordering upon, and not easily distinguishable from, manslaughter, that the offender may, with propriety, be put to sue out his pardon, according to the provisions of the statute of Gloucester, (*c*) and consequently not be entitled to a general verdict of acquittal. (*d*)

Justifiable homicide is of several kinds: as it may be occasioned by the performance of acts of unavoidable necessity, where no shadow of blame can be attached to the party killing; or by acts done by the permission of the law, either for the advancement of public justice, or for the prevention of some atrocious crime.

SECTION I.

OF EXCUSABLE HOMICIDE BY MISADVENTURE.

Persons doing a lawful act and happening to kill.

Homicide by misadventure is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. (*e*) The act must be lawful; for if it be unlawful, the homicide will amount to murder, or manslaughter, as has been already shewn: (*f*) and it must not be done with intention of great bodily harm; for then the legality of the act, considered abstractedly, would be no more than a mere cloak, or pretence, and, consequently, would avail nothing. The act must also be done in a proper manner, and with due caution to prevent danger. (*g*)

Persons following their common occupations.

Thus, if people, following their common occupations, use due caution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be homicide by

(*b*) 4 Blac. Com. 188. Fost. 288. 1 East. P. C. c. 5. s. 8. p. 222.

(*c*) 6 Edw. I. c. 9.

(*d*) Fost. 289.

(*e*) 1 East. P. C. c. 5. s. 8. p. 221. and s. 36. p. 260, 261. Fost. 258. 1 Hawk. P. C. c. 29. s. 1.

(*f*) *Ante*, 658, *et seq.* 755, *et seq.*

(*g*) 1 East. P. C. c. 5. s. 36. p. 261.

misadventure. As if workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, this will be misadventure only, if it were done in a retired place, where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given (*h*) to such as might be below. (*i*) And the party will not be more criminal who is working with a hatchet, when the head of it flies off, and kills a by-stander. (*k*) So where a person, driving a cart or other carriage, happens to drive over another, and kill him, if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be accidental death, and the driver will be excused. (*l*) A. was driving a cart with four horses in the highway at Whitechapel, he being in the cart; and the horses being upon a trot, threw down a woman who was going the same way with a burthen upon her head, and killed her. Holt, C. J., Tracey, J., Baron Bury, and the Recorder Lovell, held this to be only misadventure: but by Lord Holt, if it had been in a street where people usually pass, this had been manslaughter. (*m*) And, upon the same ground of no want of due care being imputable to the party, in a case where a person was riding a horse, and the horse, being whipt by some other person, sprang out of the road, and ran over a child and killed it, this was held to be misadventure only in the rider, though manslaughter in the person who whipped the horse. (*n*)

Persons using dangerous articles, or instruments.

As the degree of caution to be employed depends upon the probability of danger, it follows that persons using articles or instruments, in their nature peculiarly dangerous, must proceed with such appropriate and reasonable precau-

(*h*) *Ante*, 768, 769.

(*i*) 1 Hale 472. 475. 1 Hawk. P. C. c. 29. s. 4. Fost. 262. 1 East. P. C. c. 5. s. 38. p. 262.

(*k*) 1 Hawk. P. C. c. 29. s 2.

(*l*) Fost. 263. 1 Hale 476.

(*m*) O. B. Sess. before Mich. T. 1704. MS. Tracy 32. 1 East. P. C. c. 5. s. 38. p. 263. and see observations on this case, *ante*, 769, 770.

(*n*) 1 Hawk. P. C. c. 29. s. 3.

tion as the particular circumstances may require. Thus, though where one lays poison to kill rats, and another takes it and dies, this is misadventure; yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might in some cases amount to manslaughter. (*o*)

A., having deer frequenting his cornfield, out of the precinct of any forest or chace, set himself in the night-time to watch in a hedge, and set B., his servant, to watch in another corner of the field, with a gun charged with bullets, giving him order to shoot, when he heard any bustle in the corn by the deer. The master afterwards improvidently rushed into the corn himself; and the servant, supposing it to be the deer, shot and killed the master. This was ruled to be misadventure, on the ground that the servant was misguided by his master's own direction and was ignorant that it was any thing else but the deer. It seemed, however, to the learned judge who so decided, (*p*) that if the master had not given such direction, which was the occasion of the mistake, it would have been manslaughter, because of the want of due caution in the servant to shoot before he discovered his mark. (*q*) But upon this it has been remarked, that if, from all the other circumstances of the case, there appeared a want of due caution in the servant, it does not seem that the command of the master could supply it, much less could excuse him in doing an unlawful act: and that the excuse of having used ordinary caution can only be admitted where death happens accidentally in the prosecution of some lawful act. (*r*) By the same rule as to due

(*o*) 1 Hale 431. 1 East. P. C. c. 5. s. 40. p. 266.

(*p*) Lord Hale.

(*q*) 1 Hale 476. The same case is previously mentioned, 1 Hale 40. where the learned author seems to think that the offence amounted to manslaughter; but considers the question as of great difficulty. The case was, however, determined at *Peterborough*, as stated in the text.

(*r*) 1 East. P. C. c. 5. s. 40. p. 266.

caution being observed, it has been holden to be misadventure only, where a commander coming upon a sentinel in the night, in the posture of an enemy, to try his vigilance, is killed by him as such; the sentinel not being able to distinguish his commander, under such circumstances, from an enemy. (*s*)

As to the degree of caution which must be observed in the use of dangerous instruments.

But it should be observed, that the caution which the law requires, is not the *utmost* caution that can be used: it is sufficient that a reasonable precaution be taken; such as is usual and ordinary in similar cases; such as has been found, by long experience in the ordinary course of things, to answer the end. (*t*) This proper modification of the rule respecting caution does not appear to have been sufficiently attended to in the following case. A man found a pistol in the street, which he had reason to believe was not loaded, having tried it with the rammer: he carried it home, and shewed it to his wife; and she standing before him, he pulled up the cock, and touched the trigger; and the pistol went off, and killed the woman. This was ruled manslaughter. (*u*) But the legality of the decision has been doubted, on the ground that the man examined the pistol in the common way, and used the ordinary caution deemed to be effectual in similar cases. (*w*) And Mr. Justice Foster, after stating

(*s*) 1 Hale 42.

(*t*) Fost. 264.

(*u*) Rampton's case, Kel. 41.

(*w*) Fost. 264. where it is said, that perhaps the rammer, which the man had not tried before, was too short, and deceived him. But *quære*, whether the ordinary and proper precaution would not have been to have examined the pan, which, in all probability, must have been primed. The rammer of a pistol, or gun, is so frequently too short, from having been accidentally broken, that it would be very incautious in a person previously unacquainted with the instrument, to rely upon such proof as he could receive from the rammer, unless it were passed so smartly down the barrel as clearly to give the sound of the metal at the bottom. However, there is a *quære* to the case in the margin of the report; and it appears, that the learned editor (Holt, C. J.) was not satisfied with the judgment; and that it is one of the points which, in the preface, he recommends for further consideration.

his reasons for disapproving of the judgment, says, that he had been the longer upon the case, because accidents of this lamentable kind may be the lot of the wisest and best of mankind, and most commonly fall amongst the nearest friends and relations; and then proceeds to state a case of a similar accident, in which the trial was had before himself. Upon a Sunday morning, a man and his wife went a mile or two from home with some neighbours, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way; but before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church; and, in the evening, returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought it part of the way. He, taking it up, touched the trigger; and the gun went off and killed his wife, whom he dearly loved. It came out in evidence, that, while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game; but before the service at church was ended, returned it, loaded, to the place whence he took it, and where the defendant, who was ignorant of all that had passed, found it to all appearance as he had left it. "I did not enquire," says Mr. Justice Foster, "whether the poor man had examined the gun before "he carried it home; but being of opinion, upon the whole "evidence, that he had reasonable grounds to believe that "it was not loaded, I directed the jury, that if they were of "the same opinion, they should acquit him: and he was "acquitted." (*x*)

Correction in foro domestico.

It has been shewn, that where parents, masters, and other persons, having authority *in foro domestico*, give correction to those under their care, and such correction exceeds the bounds of due moderation, so that death ensues, the offence will be either murder or manslaughter, according to the

(*x*) Fost. 265.

circumstances: (*y*) but if the correction be reasonable and moderate, and by the struggling of the party corrected, or by some other misfortune, death ensue, the killing will be only misadventure. (*z*)

Death happening from lawful sports.

Such sports and exercises as tend to give strength, activity, and skill in the use of arms, and are entered into as private recreations amongst friends, such as playing at cudgels, or foils, or wrestling by consent, are deemed lawful sports; and if either party happen to be killed in such sports, it is excusable homicide by misadventure. (*a*) A different doctrine, indeed, appears to have been laid down by a very learned judge; (*b*) but the grounds of that doctrine have been ably combated by Mr. Justice Foster, who gives this good reason for considering such sports as lawful, that *bodily harm is not the motive on either side*: (*c*) and certainly, though it cannot be said that they are altogether free from danger, yet they are very rarely attended with fatal consequences, and each party has friendly warning to be on his guard. Proper caution and fair play should, however, be observed; and though the weapons used be not of a deadly nature; yet, if they may breed danger, there should be due warning given, that each party may start upon equal terms. For if two be engaged to play at cudgels, and the one make a blow at the other likely to hurt before he is upon his guard, and without warning, from whence death ensues, the want of due and friendly caution will make such act amount to manslaughter, but not to murder, the intent not being malicious. (*d*)

Sports where

Ordinarily the weapons made use of upon such occasions

(*y*) *Ante*, 670, Chap. on *Murder*. 764, Chap. on *Manslaughter*.

(*z*) 1 Hale 454, 473, 474. 4 Blac. Com. 182.

(*a*) Fost 259, 260. 1 East. P. C. c. 5. s. 41. p. 268. But there are other sports which come under a different consideration. See *ante*, 81.

(*b*) 1 Hale 472.

(*c*) Fost. 260.

(*d*) 1 East. P. C. c. 5. s. 41. p. 269.

are not deadly in their nature: but in some sports the instruments used are of a deadly nature; yet, in such cases, if they be not directed by the persons using them against each other, and therefore no danger be reasonably to be apprehended, the killing which may casually ensue will be only homicide by misadventure. Such will be the case, therefore, where persons shoot at game, or butts, or any other lawful object, and a bystander is killed; (*e*) and with respect to the lawfulness of shooting at game, it may be observed, that though the party be not qualified, the act will not be so unlawful as to enhance the accidental killing of a bystander to manslaughter. (*f*)

deadly weapons are used.

SECTION II.

OF EXCUSABLE HOMICIDE IN SELF-DEFENCE.

Homicide in self-defence, is a sort of homicide committed se et sua defendendo, in defence of a man's person or property, upon some sudden affray, considered by the law as in some measure blameable, and barely excusable. (*g*)

When a man is assaulted in the course of a sudden brawl or quarrel, he may, in some cases, protect himself by killing the person who assaults him, and excuse himself on the ground of self-defence. But, in order to entitle himself to this plea, he must make it appear, first, that before a mortal stroke given he had declined any further combat; secondly, that he then killed his adversary through mere necessity, in order to avoid immediate death. (*h*) Under such circumstances, the killing will be excusable self-defence, sometimes

Defence of person. Chance-medley.

(*e*) 1 Hale 38, 472, 475. 1 Hawk. P. C. c. 29. s. 6. 1 East. P. C. c. 5. s. 41.

(*f*) 1 Hale 475. Fost. 259.

(*g*) Fost. 273. "Self-defence culpable, but through the benignity of the law excusable."

(*h*) 1 East. P. C. c. 5. s. 51. p. 280. Fost. 273.

expressed in the law by the word *chance medley*, or (as it has been written by some) *chaud medley*; the former of which, in its etymology, signifies a casual affray; the latter an affray in the heat of blood, or passion. Both of them are pretty much of the same import: but the former has, in common speech, been often erroneously applied to any manner of homicide by misadventure; whereas it appears by one of the statutes, (*i*) and the ancient books, (*k*) that it is properly applied to such killing as happens in self-defence upon a sudden rencounter. (*l*)

Homicide upon chance-medley borders nearly upon manslaughter.

Homicide upon chance medley borders very nearly upon manslaughter; and, in fact and experience, the boundaries are in some instances scarcely perceivable, though in consideration of law they have been fixed. (*m*) In both cases it is supposed that passion has kindled on each side, and blows have passed between the parties; but in the case of manslaughter, it is either presumed that the combat on both sides had continued to the time the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. (*n*) And the true criterion between them is stated to be this: when both parties are actually combatting at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. (*o*)

The party killing must not act with premedita-

In all cases of homicide excusable by self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice: and, from the doc-

(*i*) 24 Hen. VIII. c. 5.

(*k*) Staund. P. C. 16. 3 Inst. 55, 57. Kel. 67.

(*l*) 4 Blac. Com. 184. Fost. 275. Skene De verborum significatione. Verb. Chaudmelle.

(*m*) Fost. 276.

(*n*) Fost. 277.

(*o*) 4 Blac. Com. 184.

trine which has been above laid down, it appears that the law requires, that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant; and that not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. For in no case will a retreat avail, if it be feigned, in order to get an opportunity or interval to enable the party to renew the fight with advantage. (*p*) The party assaulted must therefore flee, as far as he conveniently can, either by reason of some wall, ditch, or other impediment; or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life, or great bodily harm; and then in his defence he may kill his assailant instantly. (*q*)

tion, and must forbear as much as he can with safety to himself.

If A. challenge B. to fight, and B. declines the challenge, but lets A. know that he will not be beaten, but will defend himself; and then B., going about his business and wearing his sword, is assaulted by A., and killed; this is murder in A. But if B. had killed A. upon that assault, it had been se defendendo, if he could not otherwise have escaped; or bare manslaughter, if he could have escaped and did not. (*r*)

As in the case of manslaughter upon sudden provocation, where the parties fight upon equal terms, all malice apart, it matters not who gave the first blow; so in the case of excusable self-defence, it seems that the first assault in *a sudden affray, all malice apart*, will make no difference, *if either party quit the combat, and retreat, before a mortal wound be given.* (*s*) According to this doctrine, if A. upon a sudden quarrel assaults B. first, and upon B.'s returning the assault, A. really and *bonâ fide* flees, and being driven to the

(*p*) 1 Hale 481, 483. Fost. 277. 4 Blac. Com. 185.

(*q*) 1 Hale 483. 4 Bl. Com. 185.

(*r*) 1 Hale 453.

(*s*) Fost. 277.

wall turns again upon B. and kills him, this will be se defendendo; (*t*) but some writers have thought this opinion too favourable, inasmuch as the necessity to which A. is at last reduced, originally arose from his own fault. (*u*) With regard to the nature of the necessity, it may be observed, that the party killing cannot, in any case, substantiate his excuse, if he kill his adversary even after a retreat, unless there were reasonable ground to apprehend that he would otherwise have been killed himself. (*w*)

Under the excuse of self-defence, the principal, civil, and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself. (*x*)

Defence of property against trespassers.

If A. in defence of his house kill B., a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter; unless, indeed, there were danger of his life. But if B. enter into the house, and A., having first requested him to depart, gently lay his hands upon him to turn him out, and then B. turn upon him and assault him, and A. then kill him, it will be se defendendo, supposing that he was not

(*t*) 1 Hale 482.

(*u*) 1 Hawk. P. C. c. 29. s. 17. Lord Hale seems also to distinguish the case of him who is first attacked from the assailant, with respect to the point of retreating, 1 Hale 482. Upon this subject some remarks are offered by Mr. East, (1 East. P. C. c. 5. s. 53. p. 281, 282.) and he concludes by saying, "At any rate "I think there is great difficulty in "applying the distinction taken by "Lord Hale and Hawkins against "him who makes the first assault, to "the case of mutual combat by "consent, though upon a sud- "den occasion, where neither of "the parties makes an attack till "the other is prepared; because "in these cases it matters not who "gives the first blow; it forms no "ingredient in the merits of the "question."

(*w*) Fost. 273, 275, 289. 4 Blac. Com. 184.

(*x*) 1 Hale 484. 4 Blac. Com. 186.

able by any other means to avoid the assault, or retain his lawful possession. And so it will be, if B. enter upon A., and assault him first, though not intending to kill him, but only as a trespasser to gain the possession: for, in such case, if A. thereupon kill B., it will be only se defendendo, and not manslaughter. (*y*) And it seems, that in such a case A., being in his own house, need not fly as far as he can, as in other cases of se defendendo; for he has the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by his flight. (*z*) But where the trespass is barely against the property of another, the law does not admit the force of the provocation as sufficient to warrant the owner in making use of any deadly or dangerous weapon; more particularly if such violence is used after the party has desisted from the trespass. But if the beating be with an instrument or in a manner not likely to kill, it will only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes, without any colour, to take the goods of another, as is necessary to make him desist. (*a*)

Homicide upon unfortunate necessity.

There is one species of homicide se defendendo where the party slain is equally innocent as the person who occasions his death: and yet this homicide is also excusable, from the great universal principle of self-preservation, which prompts every man to save his own life in preference to that of another, where one of them must inevitably perish. Of this kind is the case mentioned by Lord Bacon, where upon two persons being shipwrecked and getting on the same plank, one of them, finding it not able to save them both, thrust the other from it, whereby he was drowned. (*b*) But, according to Lord Hale, a man cannot even excuse the killing of another who is innocent, under a threat, however urgent, of los-

(*y*) 3 Edw. III. Coron. 35. Crompt. 27 b. 1 Hale 486.

(*z*) 1 Hale 485.

(*a*) 1 Hale 473, 486. 1 East. P. C. c. 5. s. 56. p. 289.

(*b*) 4 Blac. Com. 186. Bac. Elem. c. 5. 1 Hawk. P. C. c. 28. s. 26.

ing his own life, if he do not comply: so that if one man should assault another so fiercely as to endanger his life, in order to compel him to kill a third person, this would give no legal excuse for his compliance. (*c*) But upon this it has been observed that if the commission of treason may be extenuated by the fear of present death, and while the party is under actual compulsion, (*d*) there seems to be no reason why homicide may not also be mitigated upon the like consideration of human infirmity: though, in case the party might have recourse to the law for his protection from the threats used against him, his fears will certainly furnish no excuse for committing the murder. (*e*)

It should further be observed that, as the excuse of self-defence is founded on necessity, it can, in no case, extend beyond the actual continuance of that necessity by which alone it is warranted: (*f*) for if a person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. (*g*)

SECTION III.

OF JUSTIFIABLE HOMICIDE.

Acts of unavoidable necessity, or permitted by law.

It has been already stated that justifiable homicide is of several kinds, as it may be occasioned by the performance of acts of unavoidable necessity, or by acts done by the permission of the law. (*h*)

(*c*) 1 Hale 51, 434.

(*d*) 1 East. P. C. c. 2. s. 15. p. 70. and the authorities there cited.

(*e*) 1 East. P. C. c. 5. s. 61. p. 294. Lord Hale says that in the most extreme case, where there could be no recourse to law, the person assailed ought rather to die himself than kill an innocent person.

(*f*) 1 East. P. C. c. 5. s. 60. p. 293.

(*g*) 4 Blac. Com. 293.

(*h*) *Ante*, 773.

Execution of malefactors.

Amongst the acts of unavoidable necessity, may be classed the execution of malefactors, by the person whose office obliges him, in the performance of public justice, to put those to death who have forfeited their lives by the laws and verdict of their country. These are acts of necessity, and even of civil duty; and, therefore, not only justifiable, but commendable, where the law requires them. (*i*) But the law must require them, otherwise, they are not justifiable; and, therefore, wantonly to kill the greatest of malefactors would be murder: and we have seen that all acts of official duty should, in the nature of their execution, be conformable to the judgment by which they are directed. (*k*)

Officers killing those who assault and resist them.

Amongst the acts done by the permission of the law, for the advancement of public justice, may be reckoned those of the officer, who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable. (*l*) A rule founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party impowered to arrest were obliged to desist, and leave the business undone: and a case, in which the officer was holden guilty of manslaughter, because he had not first given back, as far as he could, before he killed the party who had escaped out of custody, in execution for a debt, and resisted being retaken, (*m*) seems to stand alone,

(*i*) Fost. 267. 1 Hale 496. 502. 4 Blac. Com. 178.

(*k*) *Ante*, 669, and see 1 Hale 501. 2 Hale 411.

(*l*) 1 Hale 494. 1 Hawk. P. C. c. 28. s. 17, 18. Fost. 270. 4 Blac. Com. 179. 1 East. P. C. c. 5. s. 74. p. 307.

(*m*) 1 Roll. Rep. 189.

and has been mentioned with disapprobation. (*n*) With respect to resistance to officers of the customs or excise, it is enacted, that if any person passing in a public and avowed manner, with prohibited or uncustomed goods, and armed with guns, pistols, cutlasses, or other offensive weapons, shall hinder, molest, or resist, any such officers, endeavouring to seize the goods, by beating, maiming, or wounding them, or any person assisting them, the officers, and all persons by them called to their assistance, may oppose force to force, and endeavour, by the same methods that are violently used against them, and by which their lives are endangered, to defend themselves, and execute the duty of their office. And if any person so hindering, molesting, or resisting, the officers, or their assistants, shall, in so doing, be wounded, maimed, or killed, the officers, and their assistants, may plead the general issue, and give the statute and the special matter in evidence in their defence. (*o*)

Officers killing those who fly from arrest.

But where the party does not resist, but merely flies to avoid the arrest, the conduct of the officer should be cautiously regulated by the nature of the proceeding. For in civil cases, and also in the case of a breach of the peace, or any other misdemeanour, short of felony, if the officer should pursue a defendant flying in order to avoid an arrest, and should kill him in the pursuit, it will be murder or manslaughter, according to the peculiar circumstances by which such homicide may have been attended. (*p*) But if a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the

(*n*) Fost. 271. 1 East. P. C c. 5. s. 74. p. 307.

(*o*) 9 G. II. c. 35. s. 35. and it is further provided, that all justices of the peace, and others, before whom the officers and their assistants shall be brought, shall admit them to bail. And see as to resisting officers of the customs and excise, *ante*, Book II. Chap. x. p. 160. *et sequ.*

(*p*) *Ante*, 762.

pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide. (*q*) This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it: for if in these cases fresh suit be made, and à fortiori if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. And the same rule holds, if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. (*r*)

Where a person is *indicted* for a felony and will not suffer himself to be arrested by an officer, having a warrant for that purpose, the officer may lawfully kill him if he cannot otherwise be taken; though such person be innocent, and though in truth no felony have been committed. (*s*) But it seems that this must be understood only of arrests by officers, and does not extend to arrests by private persons of their own authority. (*t*)

Officers dispersing a mob in case of a riot, &c.

In the case of a riot or rebellious assembly, the peace-officers and their assistants, endeavouring to disperse the mob, are justified, both at common law and by the riot act, in proceeding to the last extremity, in case the riot cannot otherwise be suppressed. (*u*) And it has been said, that

(*q*) 1 Hale 489, 490. 1 Hawk. P. C. c. 28. s. 11. Fost. 271. 4 Blac. Com. 179.

(*r*) *Id. Ibid.* 1 East. P. C. c. 5. s. 67. p. 298.

(*s*) 1 Hawk. P. C. c. 28. s. 12.

(*t*) 2 Hale 84. *Sed vid.* 1 Hale 489, 490. and 1 East. P. C. c. 5. s. 68. p. 300, 301. where it is said, that the fact of the indictment found is a good cause of arrest by private persons, if it may be made without the death of the felon: and that if the fact of his guilt be necessary for their complete justification, it is conceived that the bill of indictment found by the grand jury would, for that purpose, be primâ facie evidence of the fact, till the contrary be proved.

(*u*) 1 Hale 53. 494, 495. MS. Tracy 36. cited 1 East. P. C. c. 5. s. 71. p. 304. Riot act, 1 G. I. st. 2. c. 5. where persons continue together an hour after proclamation. And see *ante*, Book II. Chap. XXVI. *Of Riots, &c.* p. 365. 384, 385.

perhaps the killing of dangerous rioters may be justified by any private persons who cannot otherwise suppress them, or defend themselves from them, inasmuch as every private person seems to be authorized by the law to arm himself for the preservation of the peace. (*w*)

Gaolers and their assistants killing prisoners.

Gaolers and their officers are under the same special protection as other ministers of justice: and, therefore, if in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or from others, in behalf of such prisoners, they are not obliged to retreat as far as they can with safety, but may freely, and without retreating, repel force by force; and if the party so resisting happen to be killed, this, on the part of the gaoler, or his officer, or any person coming in aid of him, will be justifiable homicide. (*x*)

Malefactores in parcis.

"If a forester, parker, or warrener, find any trespassers wandering within his liberty, intending to do damage therein, who will not yield, after hue and cry made to stand unto the peace, but do continue their malice, and disobeying the king's peace, do flee or defend themselves with force and arms, if such forester, parker, or warrener, or their assistants, kill such offenders, either in arresting or taking them, they shall not be troubled for the same, nor suffer any punishment." (*y*) But they cannot kill persons who come to take only decayed wood. (*z*) It is also enacted, that owners of deer in any inclosed land, or any persons under

(*w*) 1 Hawk. P. C. c. 28. s. 14. and see Fost. 272. Poph. 121. It was so resolved by all the judges in Easter Term, 39 Eliz. though they thought it more discreet for every one in such a case to attend and assist the king's officers in preserving the peace. And, certainly, if private persons interfere to suppress a riot, they must give notice of their intention.

(*x*) Fost. 321. 1 Hale 481. 496.

(*y*) 21 Ed. I. stat. 2.

(*z*) 1 MS. Sum. 145. 175. Sum. 37. 46. cited 1 East. P.C. c. 5. s. 31. p. 256. Palm. 546. 2 Roll R. 120. And there is a special warning in the statute, that the foresters act not from malice or malicious pretence, S. 2.

them, may resist offenders, in like manner as in ancient parks. (*a*) And by another statute, lords of manors, or any others authorized by them as game-keepers, may resist offenders in the night, within their respective manors or royalties, in the same manner and with equal indemnity as if the fact had been committed in any ancient chase. (*b*)

Sir William Hawkesworth being weary of life, and willing to be rid of it by the hand of another, having first blamed his keeper for suffering his deer to be destroyed, and commanded him to execute the law, came himself into his park at night as if with intent to steal the deer; and being questioned by the keeper, who knew him not, and refusing to stand or answer, he was shot by the keeper. This was decided to be excusable homicide by the statute de malefactoribus in parcis. (*c*)

Homicide in the prevention of any forcible and atrocious crime.

A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; and if, in a conflict between them, he happens to kill, such killing is justifiable. (*d*) But it has been holden, that this rule does not apply to any crime unaccompanied with force, as picking of pockets. (*e*) It seems, therefore, that

(*a*) 3 and 4 W. & M. c. 10. s. 5.

(*b*) 4 and 5 W. & M. c. 23. s. 4. It has been doubted whether an assistant to a legal gamekeeper could justify seizing a fishing net, under this statute, s. 5. and whether the authority were not personal. Annesley and Redding (case of) 9 St. Tri. 329, 330. But it is said, that, without considering that question, it is sufficient to observe, that the case did not turn upon this clause of the act, which has express reference to the powers given by the stat. 21 Ed. I. and that statute extends in terms to assistants. 1 East. P. C. c. 5. s. 31. p. 256.

(*c*) 1 Hale 40.

(*d*) Fost. 273. Kel. 128, 129. 1 Hale 445. 481. 484. *et sequ.* 1 Hawk. P. C. c. 28. s. 21. 24.

(*e*) 1 Hale 488. 4 Blac. Com. 180. But if one pick my pocket, and I cannot otherwise take him than by

the intent to murder, ravish, or commit other felonies attended with force or surprize, should be apparent, and not be left in doubt: so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, &c.) that the life of B. is in imminent danger; otherwise, his killing the assailant will not be justifiable self-defence. (*f*) And the rule clearly extends only to cases of felony; for if one come to beat another, or to take his goods merely as a trespasser, though the owner may justify the beating of him, so far as to make him desist, yet if he kill him it is manslaughter. (*g*) But if a house be broken open, though in the day time, with a felonious intent, it will be within the rule. (*h*)

24 Hen. VIII. c. 5. Persons killing those who are attempting to rob or murder, or commit burglary, are not to suffer any forfeiture of goods, &c. but to be fully acquitted.

A statute (*i*) made in affirmance of the common law, after reciting, that it had been doubted whether, if any person should attempt feloniously to rob or murder any persons, in or near any common highway, cart-way, horse-way, or foot-way, or in their mansions, messuages, or dwelling-places, or attempt to break any dwelling-house in the night-time, and should happen in such felonious intent to be slain by those whom they should so attempt to rob or murder, or by any person being in their dwelling-house, attempted to be broken open, the person so happening to slay the person so attempting to commit murder or burglary, should forfeit goods and chattels, enacts, "that if any person or persons "be indicted or appealed of or for the death of any "such evil-disposed person or persons attempting to

killing him, this falls under the general rule concerning the arresting of felons. 1 East. P. C. c. 5. s. 45. p. 273.

(*f*) 1 Hale 484.

(*g*) 1 Hale 485, 486. 1 Hawk. P.C. c. 28. s. 23. Kel. 132. 1 East. P. C. c. 5. s. 44. p. 272.

(*h*) 1 East. P. C. c. 5. s. 44. p. 273. In 4 Blac. Com. 180. it is said, that the rule reaches not to the breaking open of any house in the day-time, unless it carries with it an attempt of robbery also. But it will apply where the breaking is such as imports an apparent robbery, or an intention or attempt of robbery. 1 Hale 488.

(*i*) 24 Hen. VIII. c. 5.

" murder, rob, or burglarily to break mansion-houses, as " is abovesaid, the person or persons so indicted or ap- " pealed thereof and of the same by verdict so found and " tried shall not forfeit or lose any lands, tenements, goods, " or chattels, for the death of any such evil-disposed person " in such manner slain, but shall be thereof and for the " same fully acquitted and discharged," in like manner as if lawfully acquitted of the death of such person. But though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide which stand upon the same grounds of reason and justice. So that the killing of one who attempts the wilful burning of an house is free from forfeiture without the aid of this statute. (*k*)

Grounds of suspicion of a felonious design.

Important considerations will arise, in cases of this kind, as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed. One Levet was indicted for killing Frances Freeman, under the following circumstances. Levet being in bed and asleep, his servant, who had procured Frances Freeman to help her about the work of the house, and went to the door about twelve o'clock at night to let her out, conceived that she heard thieves about to break into the house; upon which she ran to him, and told him of what she apprehended. Levet arose immediately, took a drawn sword, and, with his wife, went down stairs; when the servant, fearing that her master and mistress should see Frances Freeman, hid her in the buttery. Levet with his sword searched the entry for thieves, when his wife, spying Frances Freeman in the buttery and not knowing her, conceived her to be a thief, and cried out to her husband in great fear, " Here they be that would undo us:" when Levet, not knowing that it was Frances Freeman in the buttery, hastily entered with his drawn sword, and being

Levet's case.

(*k*) 1 Hale 488. 1 East. P. C. c. 5. s. 44. p. 272.

in the dark, and thrusting before him with his sword, thrust Frances under the left breast and gave her a mortal wound, of which she instantly died. (*l*) This was ruled to be misadventure: but a great judge appears to have thought the decision too lenient; and that it would have been better ruled manslaughter; due circumspection not having been used. (*m*) Upon this opinion, however, some observations have been made; and it has been ably argued, upon the peculiar facts and circumstances of the transaction, that the case seems more properly to be one of those mentioned by Lord Hale, (*n*) where the ignorance of the fact excuses the party from all sort of blame. (*o*) And in another book of great authority the case is mentioned as one in which the defendant might have *justified* the fact, under the circumstances, on the ground that it had not the appearance even of a fault. (*p*)

Apparency of intent.

Mawgridge's case.

Questions will also sometimes arise as to the apparency of the intent in one of the parties to commit such felony as will justify the other in killing him. Mawgridge, on words of anger, threw a bottle with great force at the head of Mr. Cope, and immediately drew his sword, upon which Mr. Cope returned a bottle with equal violence: (*q*) and it was held that this was lawful and justifiable on the part of Mr. Cope, on the ground that he that has manifested malice against another is not fit to be trusted with a dangerous weapon in his hand. (*r*) There seems to have been good reason for Mr. Cope to have supposed that his life was in danger: and it was probably on the same ground that the judgment in Ford's case proceeded. Mr. Ford being in possession of a room at a tavern, several persons insisted upon having it, and turning him out, which he refused to submit

ord's case.

(*l*) Levet's case, Cro. Car. 538. 1 Hale 42, 474. Jones (W.) 429.

(*m*) Fost. 299.

(*n*) 1 Hale 42.

(*o*) 1 East. P. C. c. 5. s. 46. p. 274, 275.

(*p*) 1 Hawk. P. C. c. 28. s. 27.

(*q*) Mawgridge's case, Kel. 128, 129. *ante*, 647.

(*r*) By Lord Holt. Kel. 128, 129.

to: thereupon they drew their swords upon Mr. Ford and his company, and Mr. Ford drew his sword, and killed one of them: and this was adjudged justifiable homicide. (*s*) For if several attack a person at once with deadly weapons, as may be supposed to have happened in this case, though they wait till he be upon his guard, yet it seems, (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence; because so unequal an attack resembles more a desire of assassination than of combat. (*t*) But no assault, however violent, will *justify* killing the assailant under the plea of necessity, unless there be a plain manifestation of a felonious intent. (*u*) And it may be further observed, that a man cannot in any case justify killing another by a pretence of necessity, unless he were wholly without fault in bringing that necessity upon himself; for if he kill any person in defence of an injury done by himself, he is guilty of manslaughter at least: as in the case where a body of people wrongfully detained a house by force, and killed one of those who attacked it and endeavoured to set it on fire. (*w*)

Unless a felonious intent be manifested, an assault, however violent, will not justify killing the party. And the necessity must not be brought upon himself by the party killing.

Mr. Justice Foster was of opinion, that, upon the same principle upon which Mawgridge's case was decided, and possibly upon the rule touching the arrest of a person who has given a dangerous wound, the legislature, in the case of the Marquis *de Guiscard*, who stabbed Mr. *Harley* sitting in Council, discharged the parties who were supposed to have

(*s*) Ford's case, Kel. 51.

(*t*) 1 East. P. C. c. 5. s. 47. p. 276. and see 1 East. P. C. c. 5. s. 25. p. 243. where Ford's case is observed upon; and it is said that the memorandum, in the margin of Kelyng, to inquire of this case, and the *quære* used by Mr. Justice Foster in citing it, were probably made on the ground of the reason suggested in the margin of Kelyng for the judgment, namely, that the killing by Mr. Ford *in defence of his own possession of the room was justifiable*, which, under those circumstances, might be fairly questioned: as on that ground it might have been better ruled to be manslaughter.

(*u*) 1 East. P. C. c. 5. s. 47 p. 277.

(*w*) 1 Hawk. P. C. c. 28. s. 22. 1 Hale 405, 440, 441.

given the Marquis the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (*x*)

Interference by third persons to prevent felonies.

Where a known felony is attempted upon any one, not only the party assaulted may repel force by force, but his servant attending him, or any other person present, may interpose to prevent the mischief; and if death ensue, the party so interposing will be justified. (*y*) So, where an attempt is made to commit arson, or burglary, in the habitation, any part of the owner's family, or even a lodger, may lawfully kill the assailants, in order to prevent the mischief intended. (*z*)

Interference by third persons in cases of mutual combats and affrays.

But in cases of mutual combats or sudden affrays a person interfering should act with much caution. Where, indeed, a person interferes between two combatants with a view to preserve the peace and not to take part with either, giving due notice of his intention, and is under the necessity of killing one of them in order to preserve his own life or that of the other combatant, it being impossible to preserve them by other means, such killing will be justifiable: (*a*) but, in general, if there be an affray and an actual fighting and striving between persons, and another run in, and take part with one party, and kill the other, it will not be justifiable homicide, but manslaughter. (*b*)

Time within which homicide will be justifiable.

It should be observed, that as homicide committed in the prevention of forcible and atrocious crimes is justifiable only upon the plea of necessity, it cannot be justified unless the necessity continue to the time when the party is killed.

(*x*) 9 Ann. c. 16. Fost. 275.

(*y*) 1 Hale 481, 484. Fost. 274. And in Handcock *v.* Baker and others, 2 Bos. & Pul. 265. Chambre, J. said, "It is lawful for a "private person to do any thing to "prevent the perpetration of a felony."

(*z*) Fost. 274.

(*a*) 1 Hale 484. 1 East. P. C. c. 5. s. 58. p. 290.

(*b*) 1 East. P. C. c. 5. s. 58. p. 291. *Ante*, 719, and see also *ante*, Book II. Chap. XXVII. *Of Affrays*, p. 392.

Thus, though the person upon whom a felonious attack is first made be not obliged to retreat, but may pursue the felon till he finds himself out of danger; yet if the felon be killed after he has been properly secured, and when the apprehension of danger has ceased, such killing will be murder: though perhaps, if the blood were still hot from the contest or pursuit, it might be held to be only manslaughter, on account of the high provocation. (*c*)

(*c*) 1 East. P. C. c. 5. s. 60. p. 293. 4 Blac. Com. 185. 1 Hale 485.

CHAPTER THE FIFTH.

Of Destroying Infants in the Mother's Womb.

Common law offence.

WE have already seen, that an infant in its mother's womb, not being in rerum naturâ, is not considered as a person who can be killed within the description of murder. (*a*) An attempt, however, to effect the destruction of such an infant, though unsuccessful, appears to have been treated as a misdemeanour at common law: (*b*) and a statute has lately been passed, by which certain acts, intended to procure the miscarriage of a woman with child, are made highly penal.

43 Geo. III. c. 58. s. 1. administering poison, &c. with intent to cause the miscarriage of a woman *quick with child*, felony without clergy.

The 43 Geo. III. c. 58. s. 1. after reciting that certain heinous offences, with intent to procure the miscarriage of women, had been of late frequently committed, and that no adequate means had been provided for their prevention and punishment, enacts, that if any person or persons shall, either in *England* or *Ireland*, "wilfully, maliciously, and "unlawfully, administer to, or cause to be administered "to, or taken by any of his majesty's subjects, any deadly "poison, or other noxious and destructive substance or "thing, with intent such his majesty's subject or subjects "thereby to murder, or thereby to cause and procure the "miscarriage of any woman then being quick with child," the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to such offence, shall be

(*a*) *Ante*, 617.

(*b*) See a precedent of an indictment for this offence as a misdemeanor at common law in 3 Chit. Crim. Law 798. procured from the Crown Office, Mich. T. 42 Geo. III.

felons, and shall suffer death, as in cases of felony, without benefit of clergy.

Upon an indictment on this section of the statute, the woman, in point of fact, was in the fourth month of her pregnancy; but she swore that she had not felt the child move within her before taking the medicine, and that she was not then quick with child. The medical men, in their examinations, differed as to the time when the fœtus may be stated to be quick, and to have a distinct existence; but they all agreed, that, in common understanding, a woman is not considered to be quick with child till she has felt the child alive and quick within her, which happens with different women in different stages of pregnancy, although most usually about the fifteenth or sixteenth week after conception. And Lawrence, J. said that this was the interpretation that must be put upon the words, "quick with child," in the statute; and, as the woman had not felt the child alive within her before taking the medicine, he directed the jury to acquit the prisoner. (*c*)

The words, "quick with child," are to be construed according to the common understanding, in which they signify that the woman has felt the child move within her.

The second section of the statute recites that it might sometimes happen that poison or some other noxious and destructive substance or thing might be given, or other means used, with intent to procure miscarriage or abortion, where the woman might not be quick with child at the time, or it might not be proved that she was quick with child: and enacts, "that if any person or persons shall wilfully and "maliciously administer to, or cause to be administered to, "or taken by any woman, any medicines, drug, or other "substance or thing whatsoever, or shall use or employ, or "cause or procure to be used or employed, any instrument "or other means whatsoever, with intent thereby to cause "or procure the miscarriage of any woman not being, or "not being proved to be, quick with child at the time of ad-

43 G. III. c. 58. s. 2. Administering medicines &c. to women *not quick with child*, with intent to procure miscarriage, felony, punishable by imprisonment, &c. whipping or transportation for fourteen years.

(*c*) Rex *v.* Phillips, *Monmouth* 3 Campb. 77. Summ. Ass. 1812. *cor.* Lawrence, J.

"ministering such things, or using such means, that then "and in every such case, the person or persons so offending, "their counsellors, aiders, and abettors, knowing of and "privy to such offence, shall be and are hereby declared to "be guilty of felony, and shall be liable to be fined. im- "prisoned, set in and upon the pillory, publicly or privately "whipped, or to suffer one or more of the said punishments, "or to be transported beyond the seas, for any term not ex- "ceeding fourteen years, at the discretion of the court, "before which such offender shall be tried and convicted." (*d*) It is observable, that the using an instrument, &c. with intent to procure a miscarriage, thus made a felony within clergy, is not noticed in the former section of the statute, which relates to the procuring the miscarriage of a woman being *quick with child.*

An infusion or decoction of a shrub are *ejusdem generis.* The question upon the second section of the statute, is whether any matter or thing was administered to procure abortion.

An indictment upon this section of the statute charged the prisoner with having administered to a woman a *decoction* of a certain shrub called *savin;* and it appeared upon the evidence that the prisoner prepared the medicine which he administered, by pouring boiling water on the leaves of a shrub. The medical men who were examined stated that such a preparation is called an *infusion*, and not a *decoction*, (which is made by boiling the substance in the water) upon which the prisoner's counsel insisted that he was entitled to an acquittal, on the ground that the medicine was misdescribed. But Lawrence, J. overruled the objection, and said that infusion and decoction are *ejusdem generis*, and that the variance was immaterial: that the question was whether the prisoner administered any matter or thing to the woman to procure abortion. (*e*)

(*d*) The punishment of the pillory is now taken away, by the 56 G. III. c. 138.

(*e*) Rex *v.* Phillips, 3 Campb. 74, 75. And upon an indictment for murder, if the death be laid to have been by one sort of poison, and it turn out to have been by another, the difference will not be material. *Ante*, 678.

In the same case, witnesses having been called on behalf of the prisoner to prove that the shrub he used was not savin, the counsel for the prosecution insisted that he might, notwithstanding, be found guilty upon the last count of the indictment, which charged that he administered a large quantity "of a certain mixture, to the jurors unknown, *then* "*and there being a noxious and destructive thing*." The prisoner's counsel objected that, unless the shrub was savin, there was no evidence that the mixture was "noxious and "destructive." Lawrence, J. held, that in an indictment on this clause of the statute, it was improper to introduce these words; and that though they had been introduced, it was not necessary to prove them. And he further said, "it is immaterial whether the shrub was savin or not, or "whether or not it was capable of procuring abortion, or "even whether the woman was actually with child. If the "prisoner believed, at the time, that it would procure "abortion, and administered it with that intent, the case is "within the statute, and he is guilty of the offence laid to "his charge." (*f*)

And it is not necessary, upon an indictment on this section of the statute, charging the prisoner with having administered "a certain "mixture, "to the jurors "unknown, "then and "there being "a noxious "and de- "structive "thing," to prove that the mixture was noxious or destructive, or even that the woman was with child.

(*f*) Rex *v.* Phillips, 3 Campb. 76. The prisoner had previously been tried upon the first section of the statute, for the capital charge, and acquitted. See *Ante*, 797. Upon this second indictment he urged that he had given the young woman an innocent draught for the purpose of amusing her, as she had threatened to destroy herself, unless enabled to conceal her shame: and the jury returned a verdict of *Not guilty*.

CHAPTER THE SIXTH.

Of Rape, and the Unlawful Carnal Knowledge of Female Children.

SECTION 1.

OF RAPE.

Definition of rape.

RAPE has been defined to be the having unlawful and carnal knowledge of a woman, by force, and against her will. (*a*)

Made a capital offence by 18 Eliz. c. 7. s. 1.

This offence has, for many years past, been justly visited with capital punishment; but it does not appear to have been regarded as equally heinous at all periods of our constitution. Anciently, indeed, it appears to have been treated as a felony, and, consequently, punishable with death: but this was afterwards thought too hard; and, in its stead, another severe but not capital punishment was inflicted by William the Conqueror, namely, castration and loss of eyes; which continued till after Bracton wrote, in the reign of Henry III. (*b*) The punishment for rape was still further mitigated, in the reign of Edward I., by the statute of Westm. 1. c. 13. which reduced the offence to a tres-

(*a*) 1 Hawk. P. C. c. 41. s. 2. 1 Hale 627, 628. Co. Lit. 123 b. 2 Inst. 180. 3 Inst. 60. 4 Blac. Com. 210. 1 East. P. C. c. 10. s. 1. p. 434.

(*b*) 4 Blac. Com. 211. 1 Hawk. P. C. c. 41. s. 11. 1 Hale 627. Bract. Lib. 3. c. 28. Leg. Gul. 1. l. 19. Wilk. Leg. Anglo-Sax. 222 290.

pass, and subjected the party to two years' imprisonment, and a fine at the king's will. This lenity, however, is said to have been productive of terrible consequences; and it was, therefore, found necessary, in about ten years afterwards, and in the same reign, again to make the offence of forcible rape a felony, by the statute Westm. 2. c. 34. The punishment was still further enhanced by the statute 18 Eliz. c. 7. s. 1. which enacts, that any person committing felonious rape or ravishment, and found guilty by verdict, or outlawed, or confessing the crime upon arraignment, shall suffer death without benefit of clergy. And an indictment for this offence may be prosecuted at any time, and notwithstanding any subsequent assent of the party grieved. (*c*)

Of aiders and accessories.

All who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women; and they are also ousted of clergy. (*d*) And there may be *accessories* before and after in this offence; for though it be made felony by a statute, which speaks only of those who commit the offence, yet accessories, before and after, are consequentially included: but such accessories have their clergy. (*e*)

Of persons capable of committing rape.

The law presumes, that an infant, under the age of fourteen years, is unable to commit the crime of rape; and, there-

(*c*) 1 Hale 631, 632. 1 East. P. C. c. 10. s. 9. p. 446.

(*d*) 1 Hawk. P. C. c. 41. s. 10. Lord Baltimore's case, 4 Burr. 2179. 1 Hale 628. 633. 1 East. P. C. c. 10. s. 1. p. 435. In Rex *v.* Burgess and others, Chest. Spr. Ass. 1813, upon an indictment charging three persons jointly with the commission of a rape, an objection was taken that three persons could not be guilty of the same joint act: but it was overruled, upon the ground that the legal construction of the averment was only that they had done such acts as subjected them to be punished as principals in the offence. The execution was, however, respited, probably with a view to enable the learned judges to consult other authorities on the accuracy of their opinion: but the prisoners were afterwards executed, 5 Evans, Col. Stat. Cl. 6. p. 399 note (12) and see *ante*, 29 *et sequ.*

(*e*) 1 Hale 631, 632, 633. As to accessories being consequentially included, see *ante*, 44.

fore, it seems that he cannot be guilty of it.(*f*) This doctrine, however, proceeds upon the ground of impotency, rather than the want of discretion; and such infant may, therefore, be a principal in the second degree, as aiding and assisting in this offence, as well as in other felonies, if it appear, by sufficient circumstances, that he had a mischievous discretion. (*g*) A husband cannot be guilty of a rape upon his wife, on account of the matrimonial consent which she has given, and which she cannot retract: but he may be guilty as a principal by assisting another person to commit a rape upon his wife; for though in marriage the wife has given up her body to her husband, she is not by him to be prostituted to another. (*h*) Where a party took a woman by force, compelled her to marry him, and then had carnal knowledge of her by force, it appears to have been holden, that she could not maintain an appeal of rape against her husband, unless the marriage were first legally dissolved: but that when the marriage was made void ab initio, by a declaratory sentence in the ecclesiastical court, the offence became punishable, as if there had been no marriage. (*i*) The forcible taking away and marrying a woman against her will is, however, made felony by the statute 3 H. VII. c. 2. (*j*)

Of the persons upon whom rape may be commited.

The offence of rape may be committed, though the woman at last *yielded* to the violence, if such her consent was forced by fear of death or by duress. (*k*) And it will not be any excuse that she was first taken with her own consent, if she were afterwards forced against her will; nor will it be an excuse that she consented after the fact, or that she was a common strumpet, or the concubine of the ravisher; for she is still under the protection of the law, and may not be

(*f*) 1 Hale 630. *Ante*, 5.

(*g*) *Id. Ibid.*

(*h*) Lord Castlehaven's case, 1 St. Tri. 387. 1 Hale 629. Hutt. 116. 1 Str. 633.

(*i*) 1 Hale 629.

(*j*) *Post.* Chap. VIII., p. 817.

(*k*) 1 Hawk. P. C. c. 41. s. 6. 1 East. P. C. c. 10. s. 7. p. 444.

forced. (*k*) Circumstances of this kind, however, though they do not necessarily prevent the offence from amounting to a rape, yet are material to be left to the jury, in favour of the party accused, especially in doubtful cases. (*l*) The notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, appears to be quite exploded. (*m*)

Of the carnal knowledge necessary to constitute the offence.

It is agreed that there must be *penetratio*, or res in re, in order to constitute the "carnal knowledge," which is a necessary part of this offence. (*n*) But a very slight penetration is sufficient. Thus, where it was proved on behalf of a prisoner, who was charged with having ravished a young girl, that the passage of her parts was so narrow that a finger could not be introduced; and that the membrane called the hymen, which crosses the vagina, and is an indubitable mark of virginity, was perfectly whole and unbroken; it was left to the jury to say whether any penetration were proved. And the judges afterwards held upon a conference, (De Grey, C. J. and Eyre, B. being absent,) that this direction was perfectly right; and that the least degree of penetration is sufficient, though it may not be attended with the deprivation of the marks of virginity. (*o*)

Of emissio seminis.

But whether or not there must be *emissio seminis*, in order to constitute a rape, is a point which has been much doubted, and upon which very different opinions have been holden. (*p*) The later cases differ also upon this question. Thus, in a case of sodomy, which is governed by the same principles as rape, six judges held, upon a special verdict finding pe-

(*k*) 1 Hawk. *id.* s. 7. 1 East. *id.* p. 444, 445. 4 Blac. Com. 213.

(*l*) 1 East. P. C. c. 10. s. 7. p. 445.

(*m*) 1 Hale 631. 1 Hawk. P. C. c. 41. s. 8. 1 East. P. C. c. 10. s. 7. p. 445.

(*n*) 1 Hale 628. 3 Inst. 59, 60. 1 Hawk. P. C. c. 41. s. 3. Sum. 117. 1 East. P. C. c. 10. s. 3. p. 437.

(*o*) Russen's case, O. B. Oct. 1777. Serj. Foster's MS. 1 East. P. C. c. 10. s. 3. p. 438, 439.

(*p*) 12 Rep. 37, Sum. 117. 1 Hawk. P. C. c. 4. s. 2. c. 41. s. 3. that the emissio seminis is necessary. 1 Hale 628, *contrà*.

netration but the emission out of the body, that both emission and penetration were necessary: while on the other hand five judges thought that the injectio seminis was not necessary; and they said that injection cannot be proved in the case of a child, or of bestiality, and that penetration may be evidence of emission. (*q*) Subsequently to this case, Willes, C. J. presiding at a trial for this offence, adopted the doctrine of the proof of emission being necessary: (*r*) but that great crown lawyer, Mr. J. Foster, held otherwise upon a similar occasion, (*s*) as did Clive, J. upon another trial a few years afterwards. (*t*) The matter was further considered, in a case where the prosecutrix could not prove any emission; and Bathurst, J. directed the jury, that if they believed that the prisoner had his will of her, and did not leave her till he chose it himself, they should find him guilty, though an emission were not proved; and after the jury had returned a verdict of guilty, he said, that it was always his opinion, that it was not necessary to prove emission; and Smythe, B., who was present at the trial, was clearly of the same opinion. (*u*) And in a case which has been before mentioned, where it was agreed that the least degree of penetration was sufficient, it seems that the jury were directed by Ashhurst, J. that if the penetration were proved, the rape was complete in law. (*w*) The weight of the authorities, therefore, after these cases had been decided, was supposed to be much against the necessity of the proof of emission as well as penetration. (*x*)

(*q*) Duffin's case, O. B. 1721, or 1722, Baron Price's MS. 1 East. P. C. c. 10. s. 3. p. 437, 438. The judges thus differing in opinion, it was proposed to discharge the special verdict, and indict the party for a misdemeanour.

(*r*) Cave's case, O. B. 1747, Serj. Forster's MS. 1 East. P. C. c. 10. s. 3. p. 438.

(*s*) 1 East. P. C. *ibid.*

(*t*) Bloomfield's case, *Thetford*, 1758, Serj. Forster's MS. 1 East. P. C. *ibid.*

(*u*) Sheridan's case, O. B. 8 Geo. III. 2 MS. Sum. 333. 1 East. P. C. c. 10. s. 3. p. 438.

(*w*) Russen's case, *ante*, note (*o*).

(*x*) 1 East. P. C. c. 10. s. 3. p. 439.

But a more recent case appears to have introduced the contrary doctrine. The case, which was reserved for the opinion of the judges, stated, that the fact of penetration was positively sworn to; but that there was no direct evidence of emission. From interruption, it appeared probable that emission was not effected; and the jury, under the direction of the learned judge who tried the prisoner, found a verdict of guilty, but said, that they did not find the emission. Upon this case three of the judges (*y*) held, that the offence was complete by penetration only; but seven of them (*z*) held both emission and penetration to be necessary: they thought, however, that the fact should be left to the jury. One judge was absent; (*a*) and Lord Mansfield only stated, that a great majority seemed to be of opinion that both were necessary. It is said that the majority, in this case, proceeded upon the ground that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence: but that this definition was denied by the others, who observed, that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party. (*b*)

Upon the authority of this case it seems, therefore, that at the present time, the offence would not be considered as complete without some proof of the emissio seminis. But this doctrine is not free from considerable difficulty; and appears to be fairly open to the observation, that where the violence has proceeded to the extent of an actual penetration of the unhappy sufferer's body, an injury of the highest kind has been effected. The quick sense of honour, the

(*y*) Lord Loughborough, Buller, J. (who tried the prisoner) and Heath, J.

(*z*) Skynner, Ld. C. B., Gould, Willes, Ashhurst, and Nares, Justices, and Eyre and Hotham, Barons.

(*a*) Perryn, B.

(*b*) Hill's case, 1781. MS. Gould and Buller, Justices. 1 East. P. C. c. 10. s. 3. p. 439, 440.

pride of virtue, which nature, in order to render the sex amiable, has implanted in the female heart, is violated beyond redemption; and the injurious consequences to society are in every respect complete. (*c*)

Supposing, however, that emission is necessary, it seems that penetration is primâ facie evidence of it, unless the contrary appear probable from the circumstances. (*d*) Thus, where a woman swore that the defendant had his will with her, and had remained on her body as long as he pleased, but could not speak as to emission, Buller, J. said, that it was sufficient evidence of a rape to be left to the jury. (*e*) And he mentioned a case, which he recollected, of an indictment for a rape, where the woman had sworn that she did not perceive any thing come from the man, and that, though she had many children, she never was in her life sensible of emission from a man; and that this was ruled not to invalidate the evidence which she gave of a rape having been committed upon her. In a case where the party ravished had died before the trial, her deposition, corroborated by other evidence of actual force and penetration, was held sufficient to warrant a conviction, though there did not appear to be any direct evidence of emission. It was left to the jury to determine whether the crime had been completed by penetration and emission; and they were directed that they might collect the fact of emission from the evidence, though the unfortunate girl was dead, and could not therefore give any further account of the transaction, than

(*c*) 1 East. P. C. c. 10. s. 3. p. 436, 437. Fost. 274.

(*d*) The majority of the judges in Hill's case, *ante*, note (*b*), thought the question of emission was a fact for the jury; and see the opinion of Bathurst, J. *ante*, 804, and see 1 East. P. C. c. 10. s 3. p. 440.

(*e*) Harmwood's case, *Winchester*, Spr. Ass. 1787, 1 East. P. C. c. 10. s. 3. p. 440. The indictment was for an assault with intent to ravish; and the learned judge ordered the defendant to be acquitted of that charge, upon the evidence appearing to amount to proof of an actual rape.

that which was contained in her deposition before the magistrate. (*f*)

It appears always to have been admitted, that emissio seminis of itself makes neither rape nor sodomy; but it is spoken of as primâ facie evidence of penetration. (*g*)

Of the indictment.

As the absence of previous consent is a material ingredient in the offence of rape, it must be averred in the indictment; where it is usually expressed by stating that the fact was done "against the will" of the party. (*h*) It is essential to aver, that the offender did feloniously "ravish" the party; and the omission of the word *ravished* will not be supplied by an averment that the offender "did carnally know," &c. (*i*) It has been considered, that the words "did carnally know" are not essential, on the ground that *rapere* signifies legally as much as *carnaliter cognoscere:* (*k*) but they are at any rate appropriate in describing the nature of the crime, and appear to be generally used. (*l*) The omission of them would not, therefore, be prudent. (*m*) The indictment usually concludes "against the form of the statute;" but as the offence was anciently, as has been shewn, (*n*) a capital felony, such a conclusion has been thought to be unnecessary. (*o*)

(*f*) Flemming and Windham (case of), 2 Leach 854.

(*g*) 1 Hale 628. 1 Hawk. P.C. c. 4. s. 2. 3 Inst. 60. But *quære* how far it can be taken as evidence of penetration.

(*h*) Cro. Circ. Comp. 401. 2 Stark. Crim. Plead. 409. 3 Chit. Crim. Law, 815.

(*i*) 1 Hale 628, 632.

(*k*) 2 Inst. 180. and see 2 Hawk. P.C. c. 25. s. 56. Staundf. 81. Co. Lit. 137.

(*l*) See the Precedents referred to, *ante*, note (*h*).

(*m*) 1 East. P.C. c. 10. s. 10. p. 448. 2 Stark. Crim. Plead. 409. note (*p*). 3 Chit. Crim. Law 812. It is laid down generally, in some of the books, that the indictment must be *rapuit et carnaliter cognovit*, 1 Hale 628, 632.

(*n*) *Ante*, 800.

(*o*) 1 East. P.C. c. 10. s. 10. p. 448. but see 2 Stark. Crim. Plead. 409. note (*q*).

The party ravished is a competent witness.

It is clear that the party ravished is a competent witness: and indeed she is so much considered as a witness of necessity, that where a husband has been charged with having assisted another man in ravishing his own wife, the wife has been admitted as a witness against her husband. (*p*)

But her credibility is to be left to the jury upon the concurring circumstances.

But though the party ravished is a competent witness, the credibility of her testimony must be left to the jury, upon the circumstances of fact which concur with that testimony. Thus, if she be of good fame; if she presently discovered the offence, and made search for the offender; if she shewed circumstances and signs of the injury, whereof many are of that nature that women only are proper examiners; if the place where the fact was done were remote from inhabitants or passengers; if the party accused fled for it; these, and the like, are concurring circumstances, which give greater probability to her evidence. (*q*) But if, on the other hand, the witness be of evil fame, and stand unsupported by others; if, without being under controul, or the influence of fear, she concealed the injury for any considerable time after she had the opportunity of complaining; if the place where the fact is alleged to have been committed, was near to persons by whom she might probably have been heard, and yet she made no outcry; if she has given wrong descriptions of the place; these, and the like circumstances, afford a strong though not conclusive presumption that her testimony is feigned. (*r*)

Great caution to be used on the trial of this offence.

The application of these and other rules upon this difficult subject should always be made with due regard to the cautious observations of a great and experienced judge. Lord Hale says, "It is true, that rape is a most detestable

(*p*) Lord Castlehaven's case, 1 St. Tri. 387. 1 Hale 629. Hutt. 116. 1 Str. 633. *Ante*, 802.

(*q*) 4 Blac. Com. 213. 1 East. P. C. c. 10. s. 7. p. 445.

(*r*) 4 Blac. Com. 213, 214. 1 East. P. C. c. 10. s. 7. p. 445, 446.

" crime, and therefore ought severely and impartially to be " punished with death: but it must be remembered, that it " is an accusation easily to be made and hard to be proved, " and harder to be defended by the party accused, though " never so innocent." (*s*) He then mentions two remarkable cases of malicious prosecution for this crime that had come within his own knowledge; and concludes, " I mention these " instances, that we may be the more cautious upon trials of " offences of this nature, wherein the court and jury may, " with so much ease, be imposed upon without great care " and vigilance; the heinousness of the offence many times " transporting the judge and jury with so much indignation, " that they are over hastily carried to the conviction of the " person accused thereof, by the confident testimony, some- " times, of malicious and false witnesses." (*t*)

Punishment.

It has been already mentioned, that this offence is subjected to capital punishment; being made felony without benefit of clergy, by 18 Eliz. c. 7. (*u*)

Of an assault with intent to ravish.

Where there is no reason to expect that the facts and circumstances of the case, when given in evidence, will establish that the crime of rape has been completed, the proper course will be, to prefer an indictment at common law, for an assault with intent to ravish; which offence, though only a misdemeanour, yet is one of a very aggravated nature, and has, in many instances, been visited with exemplary punishment. (*w*) But this proceeding should not be adopted

(*s*) 1 Hale 635.

(*t*) 1 Hale 636.

(*u*) *Ante*, 801.

(*w*) To the extent of fine, imprisonment, and pillory, and finding sureties for good behaviour for life, 1 East. P. C. c. 10. s. 4. p. 441. The punishment of the pillory could not now be imposed for such offence, in consequence of the 56 Geo. III. c. 138. and with respect to sureties for good behaviour for life, it is observed, that such part of the sentence is not consonant to the practice of our present constitution in the apportionment of discretionary punishment; as tending to imprisonment for life. East. P. C. *ibid.*

where there is any probability that the higher offence will be proved; as where, upon an indictment for an assault with intent to commit a rape, the prosecutrix proved a rape actually committed, a learned judge directed an acquittal, on the ground that the misdemeanor was merged in the felony. (*x*)

SECTION II.

OF THE UNLAWFUL CARNAL KNOWLEDGE OF FEMALE CHILDREN.

The carnal knowledge of a child under ten years old, made felony without clergy, by 18 Eliz. c. 7.

In rape, as we have seen, the carnal knowledge must be *against the will* of the party: but, by the fourth section of the statute 18 Eliz. c. 7. carnal knowledge of any woman child under the age of ten years, is made felony without benefit of clergy; and this without any reference to the consent or non-consent of the child, which must therefore be considered as immaterial. The statute enacts, "that if any "person shall unlawfully and carnally know and abuse any "woman child under the age of ten years, every such un- "lawful and carnal knowledge shall be felony; and the of- "fender, thereof being duly convicted, shall suffer as a felon "without allowance of clergy."

The carnal knowledge of a child above ten and under twelve years old, made a misdemeanour by stat. Westm. 1. c. 13.

It appears at one time to have been thought, that the carnal knowledge of a child above the age of ten and under twelve years was rape, though she consented; twelve years being the age of consent in a female, and the statute Westm. 1. c. 13., which enacts "that none do ravish any maiden "*within age*, neither by her own consent nor without," being admitted to refer by the words "within age," to the age of twelve years. (*y*) It is, however, now well established,

(*x*) Harmwood's case, *cor.* Buller, J. *Winchester* Spr. Ass. 1787, 1 East. P. C. c. 8. s. 5. p. 411. and c. 16. s. 3. p. 440. *Ante*, 806.

(*y*) 1 Hale 631. 2 Inst. 180. 3 Inst. 60.

that if the child be above ten years old it is not a felonious rape, unless it be against her will and consent. (*z*) But children above that age, and under twelve, are still within the protection of this statute of Westm. 1. c. 13., the law with respect to the carnal knowledge of such children not having been altered by either of the subsequent statutes of Westm. 2. c. 34. or 18 Eliz. c. 7. (*a*) The statute Westm. 1. c. 13. makes the deflowering a child above ten years old and under twelve, though with her own consent, a misdemeanour punishable by two years' imprisonment, and fine at the king's pleasure. (*b*)

Indictment on 18 Eliz. c. 7.

It is said, that an indictment on the statute 18 Eliz. c. 7. for deflowering a child under ten years of age, ought to conclude "against the form of the statute," because the crime, as well as the punishment, is created by that statute. (*c*) And that, on the same account, it is necessary for the indictment to pursue the words of the act, and charge that the defendant feloniously, unlawfully, and carnally knew and abused the party, being under the age of ten years, without adding the word *ravished*. (*d*)

Testimony of the child.

Upon prosecutions for this offence, it is an important consideration, how far the child, upon whom the injury has been committed, is a competent witness. In former times the competency appears to have been made to depend upon the age of the child; and when the rule prevailed that no children could be admitted as witnesses under the age of nine years, and very few under ten, (*e*) the testimony of the injured child must have been for the most part excluded. A more reasonable rule has, however, been since adopted;

(*z*) Sum. 112. 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 2. p. 436.

(*a*) *Ante*, 801.

(*b*) 4 Blac. Com. 212. 1 East. P. C. c. 10. s. 2. p. 436.

(*c*) 1 East. P. C. c. 10. s. 10. p. 448.

(*d*) *Id. Ibid.*

(*e*) Rex *v.* Travers, 1 Str. 700. Rex *v.* Dunnel, 1 East. P. C. c. 10. s. 5. p. 442. 1 Hale 302. 2 Hale 278.

and it appears now to be well established, that a child of any age, if capable of distinguishing between good and evil, may be examined upon oath; but that, whatever may be its age, it cannot be examined unless sworn. (*f*) By such capability of distinguishing between good and evil, must be understood a belief in God, or in a future state of rewards and punishments; from which the court may be satisfied that the witness entertains a proper sense of the danger and impiety of falsehood. (*g*)

It appears to have been allowed, that the fact of the child's having complained of the injury recently after it was received, is confirmatory evidence; (*h*) but where the child is not fit to be sworn, it is clear that any account which it may have given to others ought not to be received. (*i*) Thus, on an indictment for a rape on a child of five years of age, where the child was not examined, but an account of what she had told her mother about three weeks after the transaction was given in evidence by the mother, and the jury convicted the prisoner principally, as was supposed, on that evidence; the judges, on a case reserved for their opinion, thought the evidence clearly inadmissible; and the prisoner was accordingly pardoned. (*k*)

In all cases of this kind, it is undoubtedly much to be wished, that in order to render the evidence of the child credible, there should be some concurrent testimony, of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded singly on the unsupported accusation of an infant under years of discretion. (*l*) But no general rule can be laid down on the

(*f*) Brazier's case, *Reading*, Spr. Ass. 1779, 1 East. P. C. c. 10. s. 5. p. 443, 444. 1 Leach 199, S. C. Powell's case, 1 Leach 110. Bull. N. P. 293. 4 Blac. Com. 214.

(*g*) White's case, 1 Leach 430, 431, and the cases cited, *id.* 431, note (*a*), and see *post*, Book on *Evidence*.

(*h*) Brazier's case, *ante*, note (*f*).

(*i*) Phil. on Evid. 15.

(*k*) Tucker's case, 1808, Phil. on Evid. 15.

(*l*) 4 Blac. Com. 214.

subject; and as a prisoner may be legally convicted on such evidence, alone and unsupported, the degree of corroboration which the account given by the witness requires is a question exclusively for the jury, from all the circumstances of the case, and especially from the manner in which the child has given its evidence. That evidence may be such as to leave no reasonable doubt of the prisoner's guilt, although it stands unsupported by other witnesses. (*m*)

Postponement of the trial, where the child was not capable of giving testimony.

Where a criminal prosecution was coming on to be tried, and the learned judge found that the principal witness was a female infant, wholly incompetent to take an oath, he postponed the trial till the following assizes, and ordered the child to be instructed in the mean time, by a clergyman, in the principles of her duty, and the nature and obligation of an oath. (*n*) And at the next assizes the prisoner was put upon his trial; and the infant, being found by the court on examination to have a proper sense of the nature of an oath, was sworn; and the prisoner was convicted upon her testimony, and executed. (*o*)

(*m*) Phil. on Evid. 16.

(*n*) Anon. cor. Rooke, J. at *Gloucester*. Mr. J. Rooke mentioned the case on a trial at the Old Bailey in 1795, and added, that upon a conference with the other Judges, on his return from the circuit, they unanimously approved of what he had done. See note (*a*) to White's case, 1 Leach 430. and 2 Bac. Abr. 577. in the notes.

(*o*) *Id. Ibid.*

CHAPTER THE SEVENTH.

Of Sodomy.

IN treating of the offence of sodomy, *peccatum illud horribile, inter Christianos non nominandum*, it is not intended to depart from the reserved and concise mode of statement which has been adopted by other writers.

Offence made capital by 27 H. VIII. c. 6.

It appears from different authors that in ancient times the punishment of this offence was death: (*a*) but it had ceased to be so highly penal when the statute 27 H. VIII. c. 6. again made it a capital offence. That statute reciting that there was not sufficient and condign punishment appointed and limited by the due course of the laws of the realm, for the detestable and abominable vice of buggery, committed with mankind or beast, enacts, "that the same "offence be from henceforth adjudged felony, and such or- "der and form of process therein be used against the of- "fenders as in cases of felony at common law; and that the "offenders being hereof convicted by verdict, confession, or "outlawry, shall suffer such pains of death, and losses and "penalties of their goods, chattels, &c. as felons be accus- "tomed to do according to the order of the common laws

(*a*) But the books differ as to the mode of punishment. According to Britton, a sodomite was to be burnt, Britt. lib. 6. c. 9. In Fleta it is said, pecorantes et sodomitæ in terrâ vivi confodiantur. With this the Mirror agrees: but adds, "issint que memoire seont re- "straine, pur le grand abomina- "tion del fait;" thereby consigning them, with just indignation, to shameful and eternal oblivion. Mirr. c. 4. s. 14. About the time of Richard the First, the practice was to hang a man, and drown a woman, guilty of this offence. 3 Inst. 58.

" of this realm; and that no person, offending in any such " offence, shall be admitted to his clergy." (*b*)

Definition of the offence.

The offence consists in a carnal knowledge committed against the order of nature by man with man; or in the same unnatural manner with woman; or by man or woman in any manner with beast. (*c*) With respect to the carnal knowledge necessary to constitute this offence, as it is the same that is required in the case of rape, it will be sufficient to refer to the preceding chapter. (*d*)

Of aiders, &c. and accessories.

Those who are present, aiding and abetting in this offence, are all principals, and deprived of the benefit of clergy: (*e*) but if the party, on whom the offence is committed, be within the age of discretion, namely, under fourteen, (*f*) it is not felony in him, but only in the agent. (*g*) There may be accessories before and after in this offence, as the statute makes it felony generally; but accessories are not excluded from clergy. (*h*)

Indictment.

The indictment must charge that the offender contra na-

(*b*) This act was at first only temporary, but made perpetual by 32 Hen. VIII. c. 3. It was afterwards repealed by the general act of 1 Ed. VI. c. 12. but by 2 Ed. VI. c. 29. the offence was made felony without clergy, though without loss of lands or goods, or corruption of blood. But this act of 2 Ed. VI. was repealed by the 1 M. c. 1. and the 25 H. VIII. c. 6. also stood repealed till the fifth year of Elizabeth. Then by the statute 5 Eliz. c. 17. the entire act of 25 H. VIII. c. 6. is revived and re-enacted, so that the offence stands at this day absolutely felony, without benefit of clergy. 1 Hale 669. And offenders standing mute, not directly answering, or challenging peremptorily, above twenty, are deprived of clergy, by the general enactment of the 3 and 4 W. and M. c. 9. s. 2.

(*c*) 1 Hale 669. Sum. 117. 3 Inst. 58, 59. 1 Hawk. P. C. c. 4. 6 Bac. Ab. *Sodomy*. 4 Blac. Com. 215. 1 Burn. Just. *Buggery*. 1 East. P. C. c. 14. s. 1. Wiseman's case, Fortesc. 91.

(*d*) *Ante*, 803. *et seqq.*

(*e*) 1 Hale 670. 3 Inst. 59. Fost. 422, 423.

(*f*) *Ante*, 8, 9.

(*g*) 1 Hale 670. 3 Inst. 59. 1 East. P. C. c. 14. s. 2.

(*h*) 1 Hale 670. Fost. 422, 423.

turæ ordinem rem habuit veneream et carnaliter cognovit. (*i*) But it is said, that this alone would not be sufficient; and that, as the statute describes the offence by the term "buggery," the indictment should also charge peccatumque illud sodomiticum Anglicè dictum *buggery* adtunc et ibidem nequiter, felonicè, diabolicè, ac contra naturam, commisit, ac perpetravit. (*k*)

Evidence.

That which has been before stated with regard to the evidence, and manner of proof, in cases of rape, ought especially to be observed upon a trial for this still more heinous offence. When strictly and impartially proved, the offence well merits strict and impartial punishment: but it is from its nature so easily charged, and the negative so difficult to be proved, that the accusation ought clearly to be made out. The evidence should be plain and satisfactory, in proportion as the crime is detestable. (*l*)

Attempts to commit sodomy.

In cases where it is not probable that all the circumstances necessary to constitute this offence will be proved, it may be advisable only to prefer an indictment for an assault with intent to commit an unnatural crime. And it should be observed, that the mere soliciting another to the commission of this crime has been treated as an indictable offence. (*m*)

(*i*) 1 Hawk. P. C. c. 4. s. 2. 3 Inst. 58, 59.

(*k*) Post. 424. referring to Co. Ent. 351. b. as a precedent settled by great advice.

(*l*) 4 Blac. Com. 215. *Ante*, 808, 809.

(*m*) See a precedent of an indictment for such solicitation, 2 Chit. Crim. L. 50. And for the principles and cases upon which such an indictment may be supported, see *ante*, 61, 62.

CHAPTER THE EIGHTH.

Of the Forcible Abduction and Unlawful Taking Away of Females; and of Clandestine Marriages.

Offences at common law.

IT appears to be the better opinion that if a man marry a woman under age, without the consent of her father or guardian, it will not be an indictable offence at common law. (*a*) But if children be taken from their parents or guardians, or others entrusted with the care of them, by any sinister means; either by violence, deceit, conspiracy, or any corrupt or improper practices, as by intoxication; for the purpose of marrying them; it appears that such criminal means will render the act an offence at common law, though the parties themselves may be consenting to the marriage. (*b*) And *seduction* may be attended with such circumstances as to make it an indictable offence. A case is reported where Lord Grey and others were charged, by an information at common law, with conspiring and intending the ruin of the Lady Henrietta Berkeley, then a virgin unmarried within the age of eighteen years, one of the daughters of the Earl of Berkeley, (she being under the custody, &c. of her father) and soliciting her to desert her father, and to commit whoredom and adultery with Lord Grey, who was the husband of another daughter of the Earl of Berkeley, sister of the Lady Henrietta, and to live and cohabit with him: and further, the defendants were charged that, in prosecution of such conspiracy, they took away the

(*a*) 1 East. P.C. c. 11. s. 9. p. 458.

(*b*) *Id. Ibid.* p. 459. And see in 3 Chit. Crim. L. 713. a precedent of an information for a misdemeanor, in procuring a marriage with a minor, by false allegations.

lady Henrietta at night, from her father's house and custody, and against his will, and caused her to live and cohabit in divers secret places with Lord Grey; to the ruin of the lady, and to the evil example, &c. The defendants were found guilty; though there was no proof of any force, but on the contrary it appeared, that the lady, who was herself examined as a witness, was desirous of leaving her father's house, and concurred in all the measures taken for her departure and subsequent concealment. It was not shewn that any artifice was used to prevail on her to leave her father's house; but the case was put upon the ground that there was a solicitation and enticement of her to unlawful lust by Lord Grey, who was the principal person concerned, the others being his servants, or persons acting by his command, and under his controul. (*c*)

Offences by statutes.

The forcible abduction and unlawful taking away of women and female children, are made highly penal by the provisions of several statutes.

3 H. VII. c. 2. makes the forcible taking away of a woman of substance a felony.

The statute 3 H. VII. c. 2. relates to the forcible taking away of a woman of substance against her will. It recites that women, as well maidens as widows and wives, having substances, some in goods moveable, and some in lands and tenements, and some being heirs apparent unto their ancestors, for the lucre of such substances, had been oftentimes taken by misdoers, contrary to their will, and after married to such misdoers, or to others by their assent, or defiled, to the great displeasure of God, and contrary to the king's laws, and disparagement of the said women, and utter heaviness and discomfort of their friends, and to the evil ensample of all other: and then enacts, "that what person "or persons from henceforth that taketh any woman *so* "against her will, unlawfully; that is to say, maid, widow, "or wife, that such taking, procuring, and abetting to the

(*c*) Rex *v.* Lord Grey, and others, s. 10. p. 460. 3 St. Tri. 519. 1 East. P. C. c. 11.

"same, and also receiving wittingly the same woman, so "taken against her will, and knowing the same, be felony; "and that such misdoers, takers, and procurators to the "same, and receitors, knowing the said offence, in form "aforesaid, be henceforth reputed and judged as principal "felons. Provided always, that this act extend not to any "person taking any woman, only claiming her as his ward "or bond woman."

The 39 Eliz. c. 9. takes away clergy from such offences.

The 39 Eliz. c. 9. s. 1. enacts, "That all and every such "person and persons, as shall be convicted or attainted of "or for any offence, made felony by the 3 H. VII. c. 2. or who "shall be indicted and arraigned of or for any such offence, "and stand mute, or make no direct answer, or shall chal-"lenge peremptorily above the number of twenty, shall, in "every such case, suffer death without any benefit of "clergy." The second section provides, that the act "shall not extend to take away the benefit of clergy, but "only from such person and persons as shall be principals "or procurers, or accessories before such offence com-"mitted."

Accessories. Question whether those who receive the woman, after the fact, are ousted of clergy.

It has been made a question of considerable doubt whether persons "receiving wittingly the woman so taken "against her will, and knowing the same," are ousted of clergy by this statute of Elizabeth. It has been said, that being declared to be principal felons by the statute H. VII. c. 2. which enacts, that such "*receitors*" be adjudged principal felons, they are ousted of clergy by the subsequent statute, which takes away clergy from all "principals" under the former statute of H. VII. (*d*) But upon this it has been observed, that by the proviso at the end of the statute of Elizabeth, it seems to have been the intention of the legislature to save the receivers of the woman after the fact from being ousted of clergy; that this proviso, distinguishing

(*d*) 1 Hale 661. But a *quære* is added to this doctrine by the learned author.

between principals and accessories before, all of whom were made principals by the former statute, must be taken to mean such principals as were deemed such at common law; and that the receiver of the woman comes more properly under the notion of an accessory after the fact, than of a principal. (*e*) It is agreed that those who receive *the offender*, knowingly, are only accessories after the fact, according to the rule of the common law, and, as such, clearly not excluded from clergy. (*f*) With respect to those who are only privy to the marriage, but in no way parties or consenting to the forcible taking away, it has been holden that they are not within the statute. (*g*)

Construction of the statute 3 H. VII. c. 2.

It is no sort of excuse that the woman was at first taken away with her own consent, if she afterwards refused to continue with the offender, and was forced against her will; for, till the time when the force was put upon her, she was in her own power; and she may from that time as properly be said to be taken against her will, as if she had never given any consent. (*h*) It is necessary that the woman taken away be married or defiled by the misdoer, or by some others with his consent; but if she were under force at the time of the taking, it is not at all material whether she were ultimately married or defiled with her own consent or not; for an offender shall not be considered as exempted from the provisions of the statute, by having prevailed over the weakness of a woman, whom he got into his power by such base means. (*i*)

Of the county in which the offence shall be said to have been committed.

If, however, a woman be taken away forcibly in one county, and afterwards go voluntarily into another county, and be there married or defiled, with her own consent, the fact is not in-

(*e*) 1 East. P. C. c. 11. s. 2. p. 452, 453.

(*f*) 1 Hale 661. 1 Hawk. P. C. c. 41. s. 9. 3 Inst. 61. St. P. C. 44. 1 East. P. C. c. 11. s. 2. p. 452, 453.

(*g*) Fulwood's case, Cro. Car. 488, 489. 1 Hawk. P. C. c. 41. s. 10.

(*h*) 1 Hawk. P. C. c. 41. s. 7.

(*i*) 1 Hale 660. 1 Hawk. P. C. c. 41. s. 8. Fulwood's case, Cro. Car. 485. 493. Swendsen's case, 5 St. Tri. 450. 464. 468.

dictable in either county; on the ground that the offence was not complete in either: but if, by her being carried into the second county, or in any other manner, there be a continuing force in that county, the offender may be indicted there; though the marriage or defilement ultimately took place with the woman's own consent. (*j*)

Case of Lockhart Gordon and Loudon Gordon. There must be a continuance of the force into the county where the defilement takes place.

The doctrine, that there must be a continuance of the force into the county where the defilement takes place, was recognized and acted upon in a case of recent occurrence, and one by which a great deal of public interest was excited. The prisoners, Lockhart Gordon, a clergyman, and Loudon Gordon, his brother, were indicted upon this statute, for the forcible abduction of Rachael Antonina Lee, under the following circumstances. The prosecutrix, Mrs. Lee, a natural daughter of Lord Le De Spencer, and entitled by his Lordship's will to a considerable fortune, married, in the year 1794, and when she was about the age of twenty, a Mr. M. A. Lee, from whom she shortly afterwards separated, and continued to live apart from him, in the receipt of an income of above £900. per annum, secured to her separate use. In the month of December 1803, when she was living in Bolton-Row, Piccadilly, the prisoner Loudon Gordon, under the care of whose mother she had been placed for some time when a girl, introduced himself to her, by means of her medical attendant, as an old acquaintance; and some short time afterwards, the other prisoner Lockhart Gordon, also called upon her; and both of them being recognized by her, they continued, but more especially Loudon Gordon, occasionally to visit at her house. Loudon Gordon called four or five times in the month of December, and several times in the following January, previous to the transaction in question. Mrs. Lee stated, that their conversations, on these visits, were chiefly upon books, as her habits were studious; but that upon Loudon Gordon taking leave after his

(*j*) Fulwood's case, Cro. Car. 485. 488. 1 Hale 660. 1 Hawk. P. C. c. 41. s. 9. 1 East. P. C. c. 11. s. 3. p. 453.

first visit he saluted her; and that on his second visit she warned him against entertaining any attachment for her, which she thought a likely thing to happen, as he was a young man; and that, upon her giving this caution, he said he had an attachment, and that his happiness was in her hands. By way of changing the conversation, she then read to him an account of a dream, which she had had, and requested him to interpret it, which he afterwards did by sending to her an interpretation, which was clever and ingenious. The third time he called he proposed a tour into Wales, which she did not agree to, either then or at any time; but she admitted that she did not give such an absolute refusal as to prevent his mentioning the subject again, and that, in a letter which he wrote to her, about the 12th of January, (and which contained strong declarations of attachment) he alluded to the tour: but she expressly stated, that she did not know of any plan for going with him any where, nor ever consented to any such plan; though, when it was mentioned by him on the same day on which she received his letter, she said, "We will talk of it." A letter from Lockhart Gordon was received by her, together with that from Loudon, in which he also mentioned the proposed tour as likely to conduce to her happiness, described himself as having a head to conceive, a heart to feel, and a hand to execute, whatever might be for her advantage, and declared that if his brother ever deceived her, he would blow his brains out. A short time before Sunday the 15th of January Mrs. Lee invited Loudon Gordon to dine with her on that day, and requested that he would bring his brother Lockhart with him; and they came accordingly. This was the time at which the offence was alledged to have been committed. According to Mrs. Lee's account of the material transactions at that time, it appeared that after dinner she said to Lockhart Gordon, "What do you think of the extraordinary plan "your brother has proposed?" To which he replied, "If he "loves you, and you love him, I think it will tend to your "mutual happiness; you will gain two friends." That she did not recollect any thing more being said upon the subject

till Lockhart Gordon pulled out his watch, said it was near seven o'clock, and that the chaise would soon be there; and said further, "You must go with Loudon to night." She thought this a joke; as no mention had been previously made of leaving London, or of any chaise; and she knew of no preparations having been made for her leaving London. About this time Loudon Gordon came towards Mrs. Lee with a ring, and attempted to put it on her finger; but she drew away her hand, and the ring was left upon the table. She then attempted to go up stairs, but Lockhart Gordon said she should not, and placed himself against the door; and either at that time, or soon afterwards, he produced a pistol: she, however, after having rung the bell violently, got out at the door, and went up stairs, where she said to her female servant, "There is a plan to take me out of my house; they are armed with pistols; say no more, but watch." She described herself as having felt quite panic-struck at that time. Soon afterwards the prisoners came up stairs, and Lockhart Gordon said, "I am determined you shall go:" this was not said in a threatening manner; but soon afterwards, upon her saying to him, "What right have you to force me out of my house?" he said, "I am desperate," and looked as if he was so. Mrs. Lee described herself as then getting into a very wretched and confused state of mind, not absolutely stupid, but unable to recollect what passed. But it appeared, from the evidence of her servants, that Loudon Gordon first came down stairs, and sent the footman to call a coach, who went accordingly; and that the only servants then in the house were two females: that Loudon returned up stairs, when a scuffle was heard almost immediately, and Mrs. Lee called out, "I am determined not to go out of my own house;" to which Lockhart Gordon replied, "I am desperate, Mrs. Lee." The female servants went immediately up stairs, and found Lockhart pushing Mrs. Lee out of the drawing room, with his arm round her waist, and Loudon near them. Mrs. Lee was in a thin muslin dress, with a small crape handkerchief about her head, as she was dressed for dinner, and without any hat or

bonnet. One of the servants put her arms round Mrs. Lee's waist to drag her away; but Lockhart Gordon produced a pistol, and swore that he would shoot the servant, by which she was so much alarmed that she desisted. The other servant then took Mrs. Lee by the hand; but quitted it upon Lockhart Gordon's threatening also to shoot her, and presenting a pistol. Lockhart Gordon then laid hold of one of the servants; and, both of them being so much alarmed as to make no further resistance, Loudon Gordon put his arm round Mrs. Lee's waist, and took her down stairs, and out at the street door; when Lockhart Gordon immediately followed. It appeared, by other witnesses, that a post chaise, which the prisoners had ordered in the course of the morning, was at that time waiting at the end of Bolton-Row; that Mrs. Lee was taken to it by Loudon Gordon; that Lockhart Gordon followed; and that it drove off immediately on the road to Uxbridge. Mrs. Lee's account was, that though she remembered but imperfectly what took place at the time she was taken away, she was certain that she went from the house against her will, but that no manual force was used to get her into the chaise. She described herself as in a state of partial stupefaction: and several of the witnesses spoke of her as being of a very nervous frame, easily agitated, and subject to depression of spirits to such an extent as to be occasionally in a state of great mental misery.

As soon as Mrs. Lee and the two prisoners had got into the chaise, it drove off at a smart pace towards Uxbridge, Mrs. Lee sitting in the middle between the prisoners; and it appeared that, after changing horses at Uxbridge and at Wycombe, the party arrived at Tetsworth, about twelve miles from Oxford, between one and two o'clock in the morning. Mrs. Lee stated, that she frequently remonstrated with the prisoners in the course of the journey; and particularly told Lockhart Gordon that it was "a most infernal measure, "and a breach of hospitality:" and repeatedly asked him for a chaise to take her back to London; making the appli-

cation principally to him, because he seemed to have taken the lead in the whole business. But it appeared, as well from her own admissions as from the evidence of the post-boys, that she never called for assistance at the inns, turnpike-gates, or other places; and one of the post-boys stated, that, at Wycombe, one of the prisoners asked her, whether she would stay there or go on to Tetsworth or Oxford, and that her answer was, "I don't care." Mrs. Lee also admitted, that a ring was put upon her finger in the course of the journey by Loudon Gordon; and that during the journey, but whether before they got to Uxbridge or afterwards she could not tell, she took a steel necklace, with a camphire bag attached to it, from her neck, and threw it out of the window of the chaise, saying, "That was my "charm against pleasure; I have now no occasion for it." She said, that she used the word "charm," as alluding to the supposed medical property of camphire in quieting the nerves, and calming the passions, particularly the passion which a person of one sex feels for a person of the other; and that she was in the habit of wearing it as a sedative: that at the time she used the expression she gave herself up, but that she afterwards expostulated. And she also admitted, that during the journey she made some enquiries concerning Loudon Gordon's health; and might, perhaps, have enquired how long it was since he had been acquainted with a person of her own sex.

At Tetsworth the parties got out of the chaise, and supper and beds were ordered to be prepared. Mrs. Lee stated, that she eat a good supper, and that there was a good deal of cheerful conversation during the repast; the whole of which she did not recollect, but that part of it related, as she believed, to Egyptian hieroglyphics and architecture. A question was then put to her, whether the whole of what passed might not have induced Loudon Gordon to have believed that he might approach her bed; to which she answered, "It might; I was in desperation." She admitted, that she might have told Loudon Gordon to see that the sheets were

well aired; but said that if she had had the perfect exercise of her judgment, and her mind had been free from force, she should have been more inclined to have ordered a chaise than to have gone to bed. After she had gone up stairs into the bed-room, the chambermaid asked her, when she should be in bed, and when the gentleman should come up; to which she replied, "In ten minutes." Upon this statement of Mrs. Lee's, in her examination, the following question was put to her, "What induced you to send such a message?" and it was objected to by the counsel for the prisoners, on the ground that it was not a question as to a fact, but to something existing in the mind of the witness. Lawrence, J. overruled the objection; but said, that whether the answer would be evidence or not must depend upon the nature of it; that if Mrs. Lee should answer, "I thought my life in danger; "for Lockhart Gordon told me, if I did not let Loudon "Gordon come to bed to me, he would blow my brains out;" such answer would certainly be evidence, though the apprehensions of the witness, unsupported by words used by the prisoners, or facts, would not. The question was then put; and Mrs. Lee answered, "I was under the impression that "my life was in danger from Lockhart Gordon; and I was "apprehensive of some serious scuffle at the inn, in which "lives might be lost." Mrs. Lee then stated, that shortly after the chambermaid left the room Loudon Gordon came to bed to her, and remained with her all the night; and that the intercourse took place between them, which usually takes place between husband and wife.

These were the material facts of the case, with the addition, that it was proved by the woman with whom the prisoners lodged in London, that, previous to the time when this transaction took place, Lockhart Gordon was pressed for money, and backward in his payments, and that London Gordon had admitted to her that he was in distressed circumstances. The learned counsel for the prisoners was proceeding in his cross-examination of Mrs. Lee, to question her as to her religious principles; and she had just admitted,

that she seldom went to any place of worship, and was inclined to doubt the Christian religion, when Lawrence, J., after having enquired of the counsel for the prosecution, whether they had any further evidence to offer of force in the county of Oxford, and been told by them that they had not, said, that he was of opinion that the case should not proceed any further. The learned judge then addressed himself to the jury, and told them, that, in order to constitute the offence with which the prisoners were charged, there must be a forcible taking, and a continuance of that force into the county where the defilement takes place, and where the indictment is preferred: that in the present case, though there appeared clearly to have been force used for the purpose of taking the prosecutrix from her house, yet it appeared also, that in the course of the journey she consented; as she did not ask for assistance at the inns, turnpike gates, &c. where she had opportunities; and that, as she was unable to fix times or places with any precision, this consent probably took place before the parties came into the county of Oxford; and that they must therefore acquit the prisoners. (*k*).

Necessary statements in the indictment.

It has been resolved, that an indictment for this offence must expressly set forth that the woman taken away had lands or goods, or was heir apparent; and that the taking was against her will; and that it was for lucre; and also that she was married or defiled; such statements being necessary to bring a case within the preamble of the statute, to which the enacting clause clearly refers, when it speaks of persons taking away a woman "*so* against her will." (*l*) But it is said not to be necessary to state in the indictment, that the taking was with an *intention* to marry or defile the party, because the words of the statute do not require such an intention, nor does the want of it in any way lessen the injury. (*m*)

(*k*) Gordons' case (Lockhart and Loudon) *cor.* Lawrence, J., *Oxford* Lent Ass. 1804, MS.

(*l*) 1 Hawk. P. C. c. 41. s. 4. 1 Hale 460. 4 Blac. Com. 2.

(*m*) 1 Hawk. P. C. c. 41. s. 6. It is

Of the evidence of the woman when taken away, and married.

There is no doubt but that the woman taken away and married may be a witness against the offender, if the force were continuing upon her till the marriage; and that she may herself prove such continuing force: (*n*) for, though the offender be her husband *de facto*, he is no husband *de jure*, in case the marriage was actually against her will. (*o*) It seems, however, to have been questioned, how far the evidence of the inveigled woman can be allowed, in cases where the actual marriage is good by her consent having been obtained after her forcible abduction.(*p*) But other authorities appear to agree, that it should be admitted, even in that case; esteeming it absurd that the offender should thus take advantage of his own wrong, and that the very act of marriage, which is a principal ingredient of his crime, should (by a forced construction of law) be made use of to stop the mouth of the most material witness against him. (*q*) And where the marriage was against the will of the woman at the time, there does not seem to be any good ground upon which her competency can be objected to, though she may have given her subsequent assent. (*r*) It also appears to have been ruled upon debate, in a modern case, that a wife is a competent witness for, as well as against, her husband, on the trial of an indictment for this offence, although she has cohabited with him from the day of her marriage. (*s*)

said, however, in 1 Hale 660, that the words *eâ intentione ad ipsam maritandam* are usually added in indictments upon this statute, and that it is safest so to do.

(*n*) Fullwood's case, Cro. Car. 488. Brown's case, 1 Ventr. 243. Swendsen's case, 5 St. Tr. 456.

(*o*) 1 Hale 660, 661. 4 Blac. Com. 209.

(*p*) 1 Hale 661, where the author observes upon Brown's case, (*ante*, note (*n*)) that some of the reasons why the woman was sworn and gave evidence were, that there was no cohabitation, and that there was concurring evidence to prove the whole fact; but that if she had freely, and without constraint, lived with the person who married her for any considerable time, her examination in evidence might be more questionable.

(*q*) 4 Black. Com. 209.

(*r*) 1 East. P. C. c. 11. s. 5. p. 454.

(*s*) Perry's case, *Bristol*, 1794, 1 Hawk. P. C. c. 41. s. 13. and in 1 East. P. C. c. 11. s. 5. p. 455. the learned author says, "I conceive it to be "now settled, that in all cases of

Statute 4 and 5 Ph. and M. c. 8.

The statute 4 and 5 Ph. and M. c. 8. makes provision for the punishment of an offence of the same kind as that which we have been considering upon the statute of Hen. VII. but inferior in degree, and differing also in this, that the taking away of the woman need not be attended with force.

4 and 5 Ph. and M. c. 8. s. 2. prohibits the taking away a maid under 16 years from the custody of the father or guardian.

The second section of this statute enacts, "that it shall "not be lawful to any person or persons, to take or convey "away, or cause to be taken or conveyed away, any maid, "or woman child unmarried, being under the age of six- "teen years, out of or from the possession, custody, or go- "vernance, and against the will of the father of such maid "or woman child, or of such person or persons to whom the "father of such maid or woman child, by his last will and "testament, or by any other act in his lifetime, hath or shall "appoint, assign, bequeath, give, or grant the order, keep- "ing, education, or governance of such maid or woman "child, except such taking and conveying away as shall be "had, made, or done, by or for such person or persons, as "without fraud or covin be, or then shall be, the master or "mistress of such maid or woman child, or the guardian in "socage, or guardian in chivalry, of or to such maid or "woman child."

4 and 5 Ph. and M. c. 8. s. 3. any person taking away a maid under 16 from the possession of the father or mother, or guardian, to be imprisoned for two years, or fined.

The third section of the same statute enacts, "that if any "person or persons above the age of fourteen years, shall "unlawfully take or convey, or cause to be taken or con- "veyed, any maid or woman child unmarried, being within "the age of sixteen years, out of or from the possession, "and against the will of, the father or mother of such "child, or out of or from the possession and against "the will of such person or persons as then shall hap- "pen to have, by any lawful ways or means, the order, "keeping, education, or governance of any such maiden

"personal injuries committed by "the husband or wife against each "other, the injured party is an "admissible witness against the "other." And see *post*, Book on *Evidence*.

" or woman child; that then every such person and per-
" sons so offending, being thereof lawfully attainted or
" convicted by the order and due course of the laws of this
" realm, (other than such of whom such person taken away
" shall hold any lands or tenements by knights' service)
" shall have and suffer imprisonment of his or their bodies,
" by the space of two whole years, without bail or main-
" prise, or else shall pay such fine for his or their said of-
" fence, as shall be assessed by the council of the queen's
" highness, her heirs or successors, in the star chamber at
" Westminster."

4 and 5 Ph. and M. c. 8. s. 4. any person so taking away and deflowering any such maid, or against the will or knowledge of the father, &c. contracting matrimony with any such maid, to be imprisoned for five years, or pay a fine.

The fourth section further enacts, " that if any person or
" persons shall so take away, or cause to be taken away,
" as is aforesaid, and deflower any such maid or woman
" child as is aforesaid, or shall against the will, or unknow-
" ing of or to the father of any such maid or woman child,
" if the father be in life, or against the will, or unknowing of
" the mother of any such maid or woman child (having the
" custody or governance of such child, if the father be dead)
" by secret letters, messages, or otherwise, contract matri-
" mony with any such maiden or woman child, except such
" contracts of matrimony as shall be made by the consent of
" such person or persons, as by the title of wardship shall
" then have, or be entitled to have, the marriage of such
" maid or woman child; that then every such person or
" persons so offending, being thereof lawfully convicted as
" is aforesaid, shall suffer imprisonment of his or their bo-
" dies, by the space of five years, without bail or mainprise,
" or else shall pay such fine for his or their said offence, as
" shall be assessed by the said council in the said star cham-
" ber; the one moiety of all which forfeitures and fines
" shall be to the king and queen's majesties, her heirs and
" successors, the other moiety to the parties grieved."

Points upon the construction of this statute.

It has been decided, that the taking away a *natural daughter*, under sixteen years of age, from the care and custody of her putative father, is an offence within this

statute. (*t*) It has also been holden that a mother retains her authority, notwithstanding her marriage to a second husband; and that the assent of the second husband is not material. (*u*) In the last case it was also ruled, that the fourth section of the statute extends only to the custody of the father, or to that of the mother where the father has not disposed of the custody of the child to others. (*v*) In a case where a widow, fearing that her daughter, who was a rich heiress, might be seduced into an improvident marriage, placed her under the care of a female friend, who sent for her son from abroad, and married him openly in the church, and during canonical hours, to the heiress, before she had attained the age of sixteen, and without the consent of her mother, who was her guardian; it was holden that in order to bring the offence within the statute it must appear that some artifice was used; that the elopement was secret; and that the marriage was to the disparagement of the family. (*w*) But upon this case it has been remarked, that no stress appears to have been laid upon the circumstance of the mother having placed the child under the care of the friend, by whose procurance the marriage was effected; and that it deserves good consideration before it is decided, that an offender, acting in collusion with one who has the temporary custody of another's child, for a special purpose, and knowing that the parent or guardian did not consent, is not within the statute; for that then every schoolmistress might dispose, in the same manner, of the children committed to her care. (*x*) It has been said, that there must be a continued refusal of the parent or guardian; and that if they once agree it is an assent within the statute, notwithstanding any subsequent dissent: (*y*) but this was not the point in judgment; and it has been observed, that it wants further confirmation. (*z*)

(*t*) Rex *v.* Cornforth, 2 Str. 1162. 1 Hawk. P. C. c. 41. s. 14. Rex *v.* Sweeting, 1 East. P. C. c. 11. s. 6. p. 457.

(*u*) Ratcliffe's case, 3 Co. 39.

(*v*) *Id. Ibid.*

(*w*) Hicks *v.* Gore, 3 Mod. 84. 1 Hawk. P. C. c. 41. s. 11.

(*x*) 1 East. P. C. c. 11. s. 6. p. 457.

(*y*) Calthorpe *v.* Axtell, 3 Mod. 169.

(*z*) 1 East. P. C. c. 11. s. 6. p. 457.

It seems that it is no legal excuse for this offence that the defendant, being related to the lady's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover, to induce the lady secretly to elope and marry him, if it appear that the father intended to marry her to another person, and so that the taking was against his consent. (*a*)

Of the proceedings upon this statute.

Though the statute only gives authority to the star-chamber and justices of assize, to hear and determine the offences mentioned in it, yet it is settled that an information or indictment will lie thereon in the court of king's bench; for as there are no negative words, the jurisdiction of that court is not excluded. (*b*) It seems also that an information by the master of the crown office will lie for this offence, as at common law; as the statute does not create any new offence, but only aggravates the punishment. (*c*) It is agreed that an indictment will lie by the rule of the common law, upon the general prohibitory clause contained in the second section of the statute, on the ground that where a thing is prohibited to be done by statute, and a penalty annexed to it by a separate substantive clause, the prosecutor is not bound to pursue the latter, but may indict on the prior general clause, as for a misdemeanor.(*d*) And the prohibition being general, the want of a corrupt motive is no answer to the criminal charge. (*e*) It seems that if an indictment or information upon this statute state, that the defendant "*being* above the age of fourteen years, took one A., then being a virgin unmarried, possessed of moveable goods, and seised of lands of great value, out of the custody of her

(*a*) Rex *v.* Twisleton and others, 1 Lev. 257. S. C. 1 Sid. 387. 2 Keb. 32. 1 Hawk. P. C. c. 41. s. 10.

(*b*) 1 Hawk. P. C. c. 41. s. 7. The court of Star-chamber was dissolved by 16 Car. I. c. 10. s. 3. Jurisdiction is given to the justices of assize by 4 & 5 Ph. & M. c. 5. s. 5.

(*c*) 1 Hawk. P. C. c. 41. s. 8. But *qu.* how far this is an offence at common law, and see *ante*, 817.

(*d*) Moor's case, 2 Mod. 130. 1 East. P. C. c. 11. s. 9. p. 459. See the principle stated *ante*, 65.

(*e*) 1 East. *ibid.*

mother, &c." the word, *being* is a sufficient averment of the facts which follow. (*f*)

The sixth section of the statute provides, that a female above the age of twelve, and under sixteen, consenting to a contract of matrimony, contrary to the statute, shall forfeit all her lands to her next of kin, during the life of her husband: so that as these stolen marriages, under the age of sixteen, were usually upon mercenary views, the statute, besides punishing the seducer, wisely removed the temptation. But it has been observed, that this latter part of the statute is now rendered almost useless by provisions of a very different kind, in the statute 26 G. II. c. 33. which makes the marriage totally void. (*g*)

4 & 5 Ph. & M. c. 8. s. 6. The female consenting to an unlawful contract, forfeits her lands during her husband's life.

Many of the provisions of this statute, 26 G. II. c. 33. which is commonly called the *Marriage Act*, and was passed for the purpose of preventing clandestine marriages, have been already stated. (*h*) The eighth section of the statute provides for the punishment of such persons as shall solemnize matrimony in prisons and other places, without publication of banns, or a licence of marriage first being obtained. It enacts, "That if any person shall solemnize "matrimony in any other place than a church, or public "chapel, where banns have been usually published, unless "by special licence from the Archbishop of Canterbury; or "shall solemnize matrimony without publication of banns, "unless licence of marriage be first had and obtained from "some person or persons having authority to grant the "same: every person knowingly and wilfully so offending, "and being lawfully convicted thereof, shall be deemed and "adjudged to be guilty of felony; and shall be transported "to some one of his Majesty's plantations in America, for "the space of fourteen years, according to the laws in force

26 G. II. c. 33. Persons solemnizing matrimony in any other place than a church, &c. or without banns or licence, to be guilty of felony, and transported for fourteen years.

(*f*) Rex *v.* Moor, 2 Lev. 179. S. P. Rex *v.* Boyal, 2 Burr. 832. 1 Hawk. P. C. c. 41. s. 9.

(*g*) 4 Blac. Com. 209, 210

(*h*) *Ante*, 290. *et sequ.*

And all marriages so solemnized, are to be void.

" for transportation of felons : and all marriages solemnized " in any other place than a church, or such public chapel, " unless by special licence as aforesaid ; or that shall be " solemnized without publication of banns, or licence of " marriage from a person or persons having authority to " grant the same, first had and obtained; shall be null " and void to all intents and purposes whatsoever." By the ninth section prosecutions for such felony must be commenced within three years after the offence committed. The act does not extend to the marriages of any of the royal family; (*i*) nor to *Scotland;* nor to any marriages amongst Quakers or Jews, where both the parties, to any such marriage, shall be Quakers or Jews; nor to any marriages solemnized beyond the seas. (*k*)

Prosecutions to be within three years.

12 G. III. c. 11. Marriages of the royal family not to be had without the consent of the king, &c.

The statute 12 G. III. c. 11. confirms the prerogative of the crown to superintend and approve of the marriages of the royal family. (*l*) The first section enacts, " that no de- " scendant of the body of King George the Second, male or " female (other than the issue of princesses who have mar- " ried, or may hereafter marry, into foreign families), shall be " capable of contracting matrimony without the previous " consent of his majesty, his heirs or successors, signified " under the great seal, and declared in council; (which con- " sent, to preserve the memory thereof, is hereby directed to " be set out in the licence and register of marriage, and to " be entered in the books of the privy council) and that " every marriage or matrimonial contract of any such de- " scendant, without such consent first had and obtained, " shall be null and void to all intents and purposes whatso- " ever." Provision is then made for a marriage, without the royal consent, of any such descendant, being above twenty-five years of age, after notice to the privy council, and the expiration of twelve months after such notice; in

Except under particular circumstances.

(*i*) S. 17.

(*k*) S. 18. And see further as to the construction of this act, *ante*, 290, *et sequ.*

(*l*) 1 East. P. C. c. 13. s. 7. p. 478.

case the two houses of parliament do not before that time expressly declare their disapprobation of the marriage. (*m*) The third section of the statute enacts, "that every person "who shall knowingly or wilfully presume to solemnize, or "to assist, or to be present at the celebration of any mar- "riage, with any such descendant, or at his or her making "any matrimonial contract, without such consent as aforesaid "first had and obtained, except in the case above men- "tioned, shall, being duly convicted thereof, incur and suffer "the pains and penalties, ordained and provided by the "statute of provision and præmunire made in the six- "teenth year of the reign of Richard the Second."

And persons solemnizing or assisting at marriages without the consent, where such consent is necessary, incur a præmunire.

It may be useful to notice some *Irish* statutes, relating to the subject of this chapter. The 6 Anne, c. 16. makes persons alluring, &c. and marrying any female having substance, or being an heiress, &c. within the age of eighteen years, liable to imprisonment for three years, and incapable of taking any benefit from the estate, real or personal, of such female. It provides also for the management of the estate during the marriage, the allowance of the woman out of the income, in case she survives, and the maintenance of the children: and directs that, after the death of the woman, the estate shall go to such person as it would have done if the act had not been made. And, by the same statute, females persuading the son of any person, having lands of the yearly value of fifty pounds, or personal estate of the value of five hundred pounds, or persuading the son of any person deceased, to contract matrimony without the consent of parents or guardians, if such matrimony be had before such son attain the age of twenty-one years, are disabled from demanding dower or jointure, or other provision, out of the real or personal estate of such son, made to or in trust for her by any deed, will, or other settlement. Accessories, procurers, &c. are to be imprisoned three years: and the clergyman celebrating the marriage is to be de-

Irish statutes, 6 Anne, c. 16. 9 G. II. c. 11.

(*m*) S. 2.

prived of all his livings; to be incapable of any spiritual preferment; and transported in like manner as foreign regulars. (*n*)

The 9 G. II. c. 11. enacts, that persons of full age marrying, or contracting to marry, persons under the age of twenty-one, without the consent of the father, guardian, or Lord Chancellor, shall forfeit £500, if the estate of the person married is of the value of £10,000; and shall forfeit £200, if the estate of the person married is under £10,000: and shall suffer a year's imprisonment. (*o*)

(*n*) 5 Ev. Col. Stat. 341.

(*o*) *Id. ibid.* referring to 2 Gabbett, 913. 916. The forfeitures are to be recovered by popular action.

CHAPTER THE NINTH.

Of Kidnapping, and Child Stealing.

SECTION I.

OF KIDNAPPING

THE stealing and carrying away, or secreting of any person, sometimes called *kidnapping*, is an offence, at common law, punishable by fine and imprisonment. (*a*) The statute 43 Eliz. c. 13. relates to an offence of this nature, and makes a particular species of it highly penal. After reciting that many of her Majesty's subjects, dwelling within the counties of *Cumberland*, *Northumberlmd*, *Westmoreland*, and the bishopric of *Durham*, had been taken out of those counties, or to other places within the counties, as prisoners; and kept barbarously, and cruelly, until redeemed by great ransoms; it enacts, that those who shall carry any such subjects, against their wills, out of those counties, or to any other place within those counties, or detain, force, or imprison them, to ransom them, or make prey of their persons or goods, or who shall be privy aiding or assisting thereto, and shall be convicted, &c. shall be adjudged to be felons; and shall suffer death without benefit of clergy.

Carrying away or secreting any person.
43 Eliz. c. 13. as to offences of this nature in the four northern counties.

(*a*) 1 East. P. C. c. 9. s. 3. p. 429, 430. Lord Grey's case, T. Raym. 473. Comb. 10. The pillory was also part of the punishment before the 56 G. III. c. 138.

Forcible abduction of persons, and sending them unto other countries.

The forcible abduction or stealing and carrying away of any person, by sending him from his own country into some other, or to parts beyond the seas, whereby he is deprived of the friendly assistance of the laws to redeem him from such his captivity, is properly called kidnapping, and is an offence of a very aggravated description. Its punishment at common law is, however, no more than fine and imprisonment; though, as has been remarked concerning it, the offence is of such primary magnitude that it might well have been substituted upon the roll of capital crimes, in the place of many others, which are there to be found. (*b*)

31 Car. II. c. 2. s. 12. The sending persons prisoners out of England, &c. made punishable by disability to hold office, and by the pains of præmunire, &c.

The 31 Car. II. c. 2. (the celebrated *Habeas Corpus* act) makes provision against any inhabitant of Great Britain being sent prisoner to foreign countries. The twelfth section enacts, that no subject of this realm, being an inhabitant or resiant of England, Wales, or the town of Berwick upon Tweed, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, Tangier, or into parts, garrisons, islands, or places beyond the seas, within or without the dominions of his Majesty. Such imprisonment is then declared to be illegal; and an action for false imprisonment is given to the party, with treble costs, and damages not less than five hundred pounds. The section then proceeds thus:—"And the person or persons who shall knowingly "frame, contrive, write, seal, or countersign, any warrant "for such commitment, detainer, or transportation, or shall "so commit, detain, imprison, or transport, any person or "persons, contrary to this act, or be any ways advising, "aiding, or assisting, therein," being lawfully convicted thereof, shall be disabled from thenceforth to bear any office of trust or profit within England, &c. or the dominions thereunto belonging, and shall incur the pains, &c. of the statute of præmunire, 16 R. II. and shall be incapable of any pardon from the king of such forfeitures or

(*b*) 1 East. P. C. c. 9. s. 4. p. 430.

disabilities. There are some exceptions in the act relating to the transportation of felons: and the sixteenth section provides, that offenders may be sent to be tried where their offences were committed, and where they ought to be tried. The seventeenth section enacts, that prosecutions for offences against the act must be within two years after the offence committed, if the party grieved be not then in prison; and if he be in prison, then within two years after his decease, or delivery out of prison, which shall first happen.

11 and 12 W. III. c. 7. s. 18. Masters of merchant vessels forcing men on shore, or leaving them behind, &c. liable to three months' imprisonment.

The statute 11 and 12 W. III. c. 7. s. 18. relates to the forcing men on shore, or refusing to bring them again to their own country, by masters of merchant vessels. It enacts, "that in case any master of a merchant ship or vessel shall, "during his being abroad, force any man on shore, or wil- "fully leave him behind in any of his majesty's plantations, "or elsewhere, or shall refuse to bring home with him again "all such of the men which he carried out with him as are in "a condition to return, when he shall be ready to proceed "in his homeward-bound voyage; every such master shall, "being thereof legally convicted, suffer three months' im- "prisonment, without bail or mainprize." (*c*)

SECTION II.

OF CHILD STEALING.

54 Geo. III. c. 101. subjects persons taking away, &c. any child under 10 years old, or receiving and harbouring such child, to the

The statute 54 Geo. III. c. 101. reciting that the practice of carrying away young children, by forcible or fraudulent means, from their parents, or other persons having the care and charge or custody of them, commonly called child stealing, had of late much prevailed and increased, enacts, "that if any person or persons shall maliciously, either by "force or fraud, lead, take or carry away, or decoy or entice

(*c*) This act was made perpetual by 6 Geo. I. c. 19. s. 3.

punishment of persons convicted of grand larceny.

"away, any child under the age of ten years, with intent to "deprive its parent or parents, or any other person having "the lawful care or charge of such child, of the possession "of such child, by concealing and detaining such child from "such parent or parents, or other person or persons having "the lawful care or charge of it; or with intent to steal "any article of apparel or ornament, or other thing of value "or use, upon or about the person of such child, to whom-"soever such article may belong; or shall receive and har-"bour with any such intent as aforesaid any such child, "knowing the same to have been so by force or fraud led, "taken or carried, or decoyed or enticed away as aforesaid; "every such person or persons, and his, her, and their "counsellors, procurers, aiders, and abettors, shall be "deemed guilty of felony; and shall be subject and liable "to all such pains, penalties, punishments, and forfeitures, "as by the laws now in force may be inflicted upon, or are "incurred by, persons convicted of grand larceny."

S. 2. The act is not to extend to the fathers of illegitimate children.

The second section of the statute provides, "that nothing "in this act shall extend, or be construed to extend, to any "person who shall have claimed to be the father of an ille-"gitimate child, or to have any right or title in law to the "possession of such child, on account of his getting posses-"sion of such child, or taking such child out of the posses-"sion of the mother thereof, or other person or persons "having the lawful charge thereof."

S. 3. Act not to extend to Scotland.

It is also provided by the third section, that the act shall not extend to *Scotland*.

CHAPTER THE TENTH.

Of attempts to Murder; of Mayhem, or Maiming; and of doing or attempting some great Bodily Harm.

ATTEMPTS to commit murder appear to have been considered as felonies in the earlier ages of our law: but that doctrine did not long prevail; and such attempts became, and still remain, at common law, punishable only as high misdemeanors. (*a*) Where an indictment is preferred for an assault with intent to murder, it seems that the intent as laid must be fully established, in order to support the indictment: thus, where a defendant was so charged in the first count of the indictment, Lord Kenyon, C. J., being of opinion, upon the facts given in evidence, that if death had ensued it would only have been manslaughter, directed the jury to acquit the defendant upon that count. (*b*)

Offences at common law.

Mayhem, or the maiming of persons, was probably at one time an offence at common law, of the degree of felony; as the judgment was *membrum pro membro*. (*c*) But this judg-

(*a*) Staund. 17. 1 East. P. C. c. 8. s. 5. p. 411. Bacon's case, 1 Lev. 146. 1 Sid. 230. where the defendant, having been convicted for lying in wait to kill Sir Harbottle Grimstone, the Master of the Rolls, was sentenced by fine and imprisonment, the finding surety for his good behaviour for life, and acknowledging his offence at the bar of the Court of Chancery. And see two precedents of indictments at common law, for misdemeanours in attempting to murder by poison, 3 Chit. Crim. L. 796.

(*b*) Mitton's case, Adjourned Sittings at *Westminster*, Octob. 1788. 1 East. P. C. c. 8. s. 5. p. 411.

(*c*) 3 Inst. 118. 1 Hawk. P. C. c. 55. s. 3. 4 Blac. Com. 206.

ment afterwards went out of use ; partly because the law of retaliation is at best an inadequate rule of punishment; and partly because, upon a repetition of the offence, the punishment could not be repeated. (*d*) The offence, therefore, appears to have been considered, in later times, as in the nature of an aggravated trespass; and the only judgment which now remains for it at common law, is fine and imprisonment. (*e*) It is, however, a misdemeanour of the highest kind, and spoken of by Lord Coke as the greatest offence under felony. (*f*)

A bodily hurt whereby a man is rendered less able, in fighting, to defend himself or to annoy his adversary, is properly a maim at common law. (*g*) Therefore the cutting off, or disabling, or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which, in all animals, abates their courage, are held to be maims: but the cutting off his ear, or nose, or the like, are not held to be maims at common law; because they do not weaken a man, but only disfigure him. (*h*) In order to found an indictment of mayhem the act must be done maliciously, though it matters not how sudden the occasion. (*i*)

A person maiming himself may be punished.

It is laid down that, by the common law, if a person maim himself in order to have a more specious pretence for asking charity, or to prevent his being impressed as a sailor, or enlisted as a soldier, he may be indicted; and, on

(*d*) 4 Blac. Com. 206.

(*e*) *Id. ibid.* 1 Hawk. P. C. c. 55. s. 3. 1 East. P. C. c. 7. s. 1. p. 393. But it is observed, that perhaps mayhem by castration might have continued an offence of higher degree, as all our old writers held it to be felony. 4 Blac. Com. 206.

(*f*) Co. Lit. 127, a.

(*g*) Staund. P. C. 3. Co. Lit. 126. 3 Inst. 62, 118. 1 Hawk. P. C. c. 55. s. 1. 4 Blac. Com. 205. 1 East. P. C. c. 7. s. 1. p. 393.

(*h*) 1 Hawk. P. C. c. 55. s. 2. 4 Blac. Com. 205, 206. 1 East. P. C. c. 7. s. 1. p. 393. 4 Bac. Ab. *Maihem* (A.)

(*i*) 1 East. P. C. c. 7. s. 1. p. 393.

conviction, fined and imprisoned. (*k*) For as the life and members of every subject are under the safeguard and protection of the king; so they are said to be *in manu regis*, to the end that they may serve the king and country when occasion shall require. (*l*)

No accessories in mayhem.

It should seem that there can be no accessories before the fact in mayhem, at common law; though there appears to have been some difference of opinion, or rather misapprehension, upon the subject. (*m*) For, supposing the offence to be in the nature of an aggravated trespass only, the rule will apply, that in crimes under the degree of felony there can be no accessories, but that all persons concerned therein, if guilty at all, are principals. (*n*) It does not appear to have been any where supposed, that there can be accessories after the fact in mayhem. (*o*)

Offences by statutes.

Attempts to murder, maiming, and the doing or attempting great bodily harm, have been made highly penal by the enactments of several statutes, which may be mentioned in the order of time in which they were passed.

5 Hen. IV. c.

The statute 5 Hen. IV. c. 5. reciting that offenders did

(*k*) 1 Hawk. P. C. c. 55. s. 4. and Co. Lit. 127, a. where Lord Coke says, "In my circuit, *anno* 1 *Jacobi regis*, in the county of Leicester, one Wright, a young, strong, and lustie rogue, to make himself impotent, thereby to have the more colour to begge, or to be relieved without putting himself to any labour, caused his companion to strike off his left hand; and both of them were indicted, fined, and ransomed."

(*l*) Co. Lit. 127, a. Bract. lib. 1. fol. 6. Pasch. 19 Ed. I. cor. Reg. Rot. 36. Northt.

(*m*) Lord Hale states, that there are no accessories before in mayhem, but that they are in the same degree as principals, 1 Hale 613. Hawkins, on the contrary, says, that it seems there may be accessories before the fact in mayhem. 2 Hawk. P. C. c. 29. s. 5. In 1 East. P. C. c. 7. s. 7. p. 401. there is a learned argument, to shew that the latter opinion proceeded on a mistake.

(*n*) *Ante*, 44.

(*o*) 1 Hawk. P. C. c. 55. s. 13. and 2 Hawk. P. C. c. 29. s. 5. 1 East. P. C. c. 7. s. 7. p. 401.

5. Cutting tongues, or putting out eyes, made felony.

daily beat, wound, imprison, and maim divers of the king's liege people, and after purposely cut their tongues, or put out their eyes, enacts "that in such case the offenders that "so cut tongues, or put out the eyes of any the king's liege "people, and that duly proved and found that such deed "was done of malice prepensed, they shall incur the pain of "felony." The words "of malice prepensed," are explained to mean voluntarily and of set purpose, however sudden the occasion. (*p*) This statute was intended to put a stop to a cruel practice of cutting the tongues, or putting out the eyes of persons beaten, wounded, or robbed, in order to prevent them from giving evidence against the offenders; and it appears to have had the desired effect. (*q*)

37 Hen. VIII. c. 6. Persons cutting off ears are to forfeit treble damages, and pay a fine of 10*l.*

Next in order of time is the statute 37 Hen. VIII. c. 6. the fourth section of which, amongst other provisions, enacts, that "if any person or persons maliciously, willingly, or unlaw-"fully cut or cause to be cut off the ear or ears of any of "the king's subjects, otherwise than by authority of the "law, chance medley, sudden affray or adventure," every such offender shall not only forfeit to the party grieved treble damages, to be recovered by action of trespass, but shall also forfeit to the king for every such offence £10. in the name of a fine.

22 and 23 Car. II. c. 1. (Coventry Act) Malicious maiming made felony without benefit of clergy.

A more severe and effectual statute, 22 and 23 Car. II. c. 1. was afterwards passed, upon the subject of malicious maiming. It is usually called *the Coventry act;* having been occasioned by a violent attack upon *Sir John Coventry* in

(*p*) 3 Inst. 62. And as to the meaning of the word malice, see *ante*, 613, *et sequ.*

(*q*) 3 Inst. 62. where the learned writer states, that this law did so terrify offenders, that there appeared to have been hardly any prosecutions for the offence: and he observes, "Of all statutes those "are to be preferred, which pre-"vent offences, before they be done, "before those which punish them "after they be done. And there-"fore, in the making of this law, "there was salutaris severitas et "beata securitas."

the street, and slitting his nose, in revenge (as was supposed) for some obnoxious words uttered by him in parliament. (*r*) The seventh section enacts, "that if any person "or persons, on purpose and of malice forethought, and by "lying in wait, shall unlawfully cut out or disable the "tongue, put out an eye, slit the nose, cut off a nose or lip, "or cut off or disable any limb or member of any subject "of his majesty, with intention, in so doing, to maim or "disfigure, in any the manners before mentioned, such his "majesty's subject; that then and in every such case, the per-"son or persons so offending, their counsellors, aiders, and "abettors, (knowing of and privy to the offence as aforesaid) "shall be and are hereby declared to be felons, and shall "suffer death, as in cases of felony, without benefit of "clergy." But by the subsequent section, no attainder of such felony is to extend to corrupt the blood, or forfeit the dower of the wife, or the lands, goods, or chattels of the offender.

Construction of the statute 22 and 23 Car. II. c. 1.

Several points have been holden upon the construction of this statute, which may be considered, as they relate, 1. to the "purpose and malice forethought;" 2. to the lying in wait; 3. to the kind of maiming or disfiguring; and, 4. to the intention to maim or disfigure. It is not thought necessary to state them much in detail, as offences against this act appear to be included in the more general provisions of a recent statute, 43 Geo. III. c. 56. which will be presently mentioned.

As to the purpose and malice forethought.

With respect to the "purpose and malice forethought," it may be observed, that it must be substantiated by proving a deliberate and premeditated design to do a personal injury to another, of the sort described in the statute (*s*) It

(*r*) 4 Blac. Com. 207. And see for the history of this transaction, Burnet Hist., Vol. I. p. 269. fol. and 7 Hume's Hist. 468, 469.

(*s*) 1 East. P. C. c. 7. s. 3. p. 394. citing 1 MS. Sum. 122. And see as to malice aforethought, *ante*, 613, *et sequ.*

does not, however, seem necessary, that the malicious intention should be directed against any particular individual: for if it be conceived against all persons who may happen to fall within the scope of the perpetrator's design, the particular mischief done to any one will be connected with the general malignant intent, so as for the statute to attach upon the offenders. (*t*) And it seems clear that, if a man striking another, with such an evil intent as would make him guilty of mayhem if the person struck at should be maimed, happen to miss that person and strike a third person, and maim him, he will be equally guilty. (*u*)

As to the lying in wait.

In order to satisfy the words "lying in wait," it seems that there must be some deliberate watching for an opportunity to effect the evil purpose. But it is not necessary that the party should place himself in any particular concealment, and then rush out of his lurking place to do the mischief. If, after having formed the intention, he takes a convenient opportunity of doing the premeditated deed, and does it with deliberation, it is a lying in wait; though he do not take any particular length of time, or use any extraordinary degree of preparation. (*w*) Thus, where the prisoner with many other persons, supposed to be a gang of thieves, beset the prosecutor as he was passing along the street with his master's cart loaded with sugar, and after he had received several severe wounds from some of them, and there had been repeated exclamations by several of them of "Damn you, "where are your knives?" the prisoner made a stroke at him with a large knife, and gave him a dreadful wound on the face, but it appeared that the cart was not robbed, and the prosecutor said, that he could suppose no other cause for this cruel treatment, than that it was intended by way of revenge against him, for having detected and beat off

(*t*) 1 East. P. C. c. 7. s. 4. p. 396. Carrol and King (case of), *post*, 847.

(*u*) 2 Hawk. P. C. c. 23. s. 16. and see *ante*, 658, *et sequ.*

(*w*) By Eyre, B. in Mills's case, 1 Leach 259.

some thieves who had made an attempt to rob the cart, near the same place, on the preceding evening, the case was left to the jury upon the question of lying in wait. And the learned judge desired them to consider whether the fact were deliberately and intentionally done by lying in wait for that purpose, on the account suggested, or from any other malicious and deliberate motive; or whether it were a sudden violent impulse of rage, not in the previous contemplation of the parties; in which latter case, it was not within the statute: but he laid stress on the expression uttered by some of the gang—"Where are your knives?" as explanatory of a previous design to do such a mischief. (*x*) In another case, where a gentleman, having detected a boy in picking his pocket, had seized him, and was carrying him along the street, and the prisoner, who was lurking thereabouts, came up to them, and after walking for some little time, sometimes before and sometimes after them, at last struck the gentleman a severe blow across the face with a knife, saying, "Damn you, Sir, let the boy go;" the two judges who inclined most to a strict construction of the words "lying in wait," &c. yet were of opinion that the circumstance of the prisoner passing before the gentleman, and waiting till he came up, and then giving him the wound, was a lying in wait within the statute. (*y*)

But if the mischief be done in a sudden attack, without any premeditated design against the person, there will not be a lying in wait within the statute. Thus, where the prisoner was stealing turnips in a field, and, being found by the servant of the owner of the field in the very act of taking them, struck the servant immediately, with a sharp instrument, and slit his nose; it was holden that this was not an offence within the statute: all the judges holding that there was not sufficient evidence of a lying in wait; and

(*x*) Mills's case, 1 East. P. C. c. 7. s. 5. 1 Leach 259.

(*y*) Carrol and King (case of) 1 East. P. C. c. 7. s. 3. p. 394, 395. and *id.* s. 5. p. 397. citing MS. Gould, J.

some of them considering that the having the instrument, and using it, was with intent to escape, and not to murder or maim. (*z*) And the lying in wait must be with the view, and for the purpose, described in the statute. Thus, where the commander of a press-gang maimed a man, whom he casually met, and who resisted being pressed, and against whom it appeared that he had an old grudge; though the jury found that the wounding was of malice aforethought, yet the judges, upon a reference to them, were of opinion that there was no lying in wait, so as to bring the offence within the intent and purview of the statute. (*a*)

As to the kind of maiming or disfiguring.

The maiming or disfiguring must also be of such a nature as the statute describes. Thus, where a husband, who had lived a long while separate from his wife, visited her again, and, having persuaded her to let him sleep with her, took an opportunity, during the night, and while she was asleep, to make a wound across her throat, about three inches in length, with a razor, which he had procured, and concealed for the purpose; it was ruled that the offence was not complete, there not being such a maim as the act requires. (*b*) But it has been decided that a large transverse wound across the nose, so wide and deep as to render the bone visible, is a slitting of the nose, within the statute, although the nostril be not thereby perforated. (*c*) And in another case, where there was a deep cut *across* the nose, which separated the flesh, and went quite through into the nostril, an objection that the nose

(*z*) Tickner's case, reserved for the opinion of the twelve judges, from the Old Bailey Sess. 1778. 1 Hawk. P. C. c. 55. s. 12. 1 Leach 187. 1 East. P. C. c. 17. s. 6. p. 398.

(*a*) Rex *v.* Mackey and Arrigoni, *Kingston* Spr. Ass. 1778. 1 East P. C. c. 7. s. 6. p. 399.

(*b*) Lee's case, Old Bailey 1763, *cor.* Parker, C. B. 1 Hawk. P. C. c. 55. s. 10. The same case is reported in 1 Leach 51. But the grounds on which the court ruled that the offence was not within the statute, are not there stated.

(*c*) Carrol and King (case of) 1 Leach 55. 1 East. P. C. c. 7. s. 3. p. 394, 395.

could not be said to be slit because the edge of it was not cut through, was overruled. (*d*).

As to the intention to maim or disfigure.

The words in the statute are "with intention in so doing to maim or disfigure:" but these words have been considered as merely auxiliary to the preceding words, "on purpose and of malice aforethought," confining the crime to an intended violence. (*e*) So that it has been ruled, that if a man attack another, of malice aforethought, in order to murder him with a bill, or any other such like instrument, which cannot but endanger the maiming him, and in such attack happen not to kill, but only to maim him, he may be indicted on this statute: and that it shall, in such case, be left to the jury, upon the evidence, whether there was a design to murder by maiming, and, consequently, a malicious intent to maim as well as to kill; in which case the offence is within the statute, though the primary intention was murder. (*f*)

Of aiders and abettors.

This statute of 22 & 23 Car. II. expressly extends to counsellors, aiders, and abettors, knowing of and privy to the offence: it includes, therefore, all accessories before. But in a case where it appeared that one of the prisoners, though present at the fact, and guilty of a trespass and assault, was nevertheless altogether ignorant of any intention to maim or disfigure, the court directed that he should be acquitted in the first instance, before the guilt or innocence of the perpetrator was ascertained. (*g*)

(*d*) Rex *v.* Coke and Woodburn, 6 St. Tri. 212, *et sequ.*

(*e*) 1 East. P. C. c. 7. s. 6. p. 399, 400.

(*f*) Rex *v.* Coke and Woodburn, *ante*, note (d), 1 Hawk. P. C. c. 55. s. 8. 4 Bac. Ab. *Maihem* (B). 4 Blac. Com. 206. note (k). 1 East. P. C. c. 7. s. 6. p. 400. in which last book it is said, that on the conference of the judges on another case (Carrol's, *ante*, note (c)) Willes, J. and Eyre, B. expressed some dissatisfaction with this case; and thought at least that the construction ought not to be carried further.

(*g*) Rex *v.* Mackey and Arrigoni, 1 East. P.C. c. 7. s. 6. p. 399. and s. 7. p. 401.

Of the indictment.

An indictment upon this statute must pursue the words of it, and allege the offence to have been committed "on "purpose, of malice aforethought, and by lying in wait;" and state that the act was done with the intent mentioned in the statute. But as the words of the statute are in the disjunctive, an averment either that the act was done with intent to *maim*, or with intent to *disfigure*, according to the subject matter, seems to be sufficient. (*h*)

9 Anne, c. 16. Attempting to kill, assaulting, &c. a privy counsellor, felony without clergy.

The next statute in the order of time is the 9 Anne, c. 16. which was passed for the more especial protection of privy counsellors in the execution of their office; and was made on the occasion of Mr. Secretary Harley being stabbed by *Anthony de Guiscard*, who was at the time under examination before the privy council. It enacts, "that if any per-"son or persons shall unlawfully attempt to kill, or shall "unlawfully assault, and strike, or wound, any person be-"ing one of the most honourable privy council, when in "the execution of his office of a privy counsellor, in council, "or in any committee of council, that then the person or "persons so offending, being thereof convicted in due form "of law," shall be felons, and suffer death without benefit of clergy.

9 G. I. c. 22. Maliciously shooting at any person, felony without clergy.

The statute 9 G. I. c. 22. relates to the offence of wilfully and maliciously shooting at any person in any dwelling-house, or other place; an offence of which the probable consequence may be either the killing or maiming such person. It enacts, that if any person or persons "shall wilfully and "maliciously shoot at any person in any dwelling-house, "or other place;" or shall by gift, or promise of money, or other reward, procure any subject to join him or them, in any such unlawful act; every person so offending, and being convicted, shall be adjudged guilty of felony, and suffer death without benefit of clergy.

(*h*) 1 East. P. C. c. 7. s. 8. p. 402.

Construction of this statute.

This statute contains enactments concerning many other offences besides that which has been above set forth, and is commonly called the *Black Act*; a part of it relating to offences committed by persons in disguise, or having their faces blacked: but it is settled that it is not necessary for the completion of the offence now under consideration that the offender should have his face blacked, or be in any other manner disguised. (*i*)

It extends to persons aiding and assisting.

It has been determined that this statute extends not only to the person or persons who actually shoot at another, but also to every person who is present, aiding and assisting, to commit the offence: for as the statute creates a new felony, the consequences incidental to a felony at common law follow of course; and the rule attaches, that every person present, aiding and assisting, is a principal in the second degree. (*k*) An objection, therefore, which was taken in a prosecution upon this statute, that three persons could not be guilty of the same act of shooting, and that, as the indictment charged the act to have been done by three, one only could not be convicted, (*l*) does not appear to be well founded: for, as has been observed upon this case, if it is settled that under a charge for doing an act a person may be convicted as a principal in the second degree, there is no inconsistency in alleging an act to be done by several which could, in its immediate operation, be only committed by one; and the legal construction of the averment is only that they have done such acts as subject them to be punished as

(*i*) Arnold's case, 8 St. Tri. 313. 1 Hawk. P. C. c. 55. *Of Shooting*, &c. s. 4. 1 East. P. C. c. 8. s. 6. p. 412.

(*k*) Coalheavers' case, O. B. 1768. Cas. Cr. L. 61. 1 Leach 64. 1 Hawk. P. C. c. 55. *Of Shooting*, &c. s. 11. 1 East. P. C. c. 8. s. 6. p. 413. and see *ante*, 29. *et sequ.* 37, 38.

(*l*) Rex *v.* Gibson, Mutton and Wiggs. 1785. 1 Leach 359. 1 East. P. C. c. 8. s. 7. p. 413. This objection was not formally determined, the prisoner having been convicted of another capital offence at the same time: but the opinion of the judges was probably against the objection; and Buller, J. in Rex *v.* Young, 3 T. R. 105. speaks of the case as having been so decided.

principals in the offence. (*m*) And in a subsequent case, where the indictment charged that the prisoner and divers others unknown shot at the prosecutor; and, in a second count, that a person unknown shot at the prosecutor and that the prisoner was present aiding &c.; and upon the evidence, it appeared, that the shot was probably not fired by the prisoner; Ashhurst, J. told the jury that if they were of opinion that the prisoner and the other persons were in a confederacy together to make an attack upon the house of the prosecutor's master, and came armed with an intention to oppose all resistance, and that, in the prosecution of that purpose, the prisoner or *any of his associates* shot at the prosecutor, they should find the prisoner guilty. (*n*)

The shooting must be *malicious.*

The words of the statute are "if any person or persons "shall wilfully and *maliciously* shoot, &c;" thereby making *malice* an essential ingredient in the offence. No act of shooting, therefore, will amount, under this statute, to a capital offence, unless it be accompanied with such circumstances as, in construction of law, would have amounted to the crime of murder, if death had ensued: and it follows, that neither an accidental shooting, nor a shooting in a transport of passion excited by such a degree of provocation as would have reduced the homicide, if it had ensued, to the offence of manslaughter, are within the meaning of the statute (*o*)

And the instrument must be load-

It has been said, that upon an indictment on this statute, it is necessary to shew that the instrument was loaded with

(*m*) 5 Evans, Col. Stat. Cl. 6. p. 399, note (12) and see *ante*, 37, 38.

(*n*) Wells's case, *Kent* Spr. Ass. 1786. 1 East. P. C. c. 8. s. 7. p. 414. The jury found the prisoner guilty; and upon reference to the judges, they were all of opinion, that the direction was right, and the conviction proper. And they said, that the Coalheavers' case (*ante*, 37, 38. and 851. note (k)) was good law.

(*o*) Gastineaux's case, 1 Leach 417. 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 7. 4 Blac. Com. 207. note (2). 1 East. P. C. c. 8. s. 6. p. 412.

gunpowder, and also with a bullet, slug, or other deadly substance; but that it is sufficient if such facts appear from the general circumstances of the case. (*p*) In a case where it did not appear whether the wounds, which the prosecutor had received in his neck and chin, were given by the wadding, or by a ball from a pistol, except that the prisoner, who was endeavouring to effect an escape at the time, exclaimed with an oath, "Let me pass, or I will blow your "brains out," and immediately fired, and the prosecutor said, that he apprehended the wounds must have been given by a ball, from the sensation he felt at the time, and because it took him in one place, and another witness said, that the report was very strong, for so small a pistol; it was contended that there was not sufficient evidence that the pistol was loaded with a leaden bullet. But the court thought that there was sufficient evidence of that fact to go to the jury: and the jury found the prisoner guilty. (*q*) It is necessary also that the shooting should be with an instrument levelled *at* the party. So that where the prosecutor, who was landlord of the premises occupied by the prisoner, had come in the night to bring provisions for a man whom he had put into possession of the prisoner's goods under a distress for rent, and had got over the pales of the garden for that purpose, but, upon being met by the prisoner and severely beaten, was making his retreat, in the dark, over another part of the pales, more than five yards' distance from the place at which he entered, when the prisoner levelled a gun at the place where the prosecutor got into the garden, and immediately fired it off; the gun being thus fired in a different direction from that in which the prosecutor was going, the court held that it was not a shooting *at* the prosecutor within the meaning of the statute. (*r*)

ed with a bullet, &c. and be levelled *at* the party.

(*p*) 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 9. citing Rex *v.* Elliott, Old Bailey 1787.

(*q*) Weston's case, 1 Leach 247.

(*r*) Empson's case, 1 Leach 224. 1 Hawk. P. C. c. 55. *Of Shooting, &c.* s. 10.

The shooting may be in the party's own house.

An objection was taken, upon an indictment on this statute, that the prisoner, having fired at the party within his own house, was not within the meaning of the statute; but it was overruled. (*s*)

Of the indictment.

The words of the statute "wilfully and maliciously" have been considered as so far descriptive of the offence, that an indictment, where the act was laid to be done "unlawfully maliciously and feloniously," the word *wilfully* being omitted, was held to be insufficient. (*t*) It seems that if the indictment be for shooting "in a dwelling house," and state the name of the owner of the house, it will be necessary to prove the name as stated: as in a case where the prisoner was indicted for shooting in the dwelling house of *James Brewer* and *John Sandy*, and it appeared upon the evidence that the names were in fact *John Brewer* and *James Sandy*, the variance was ruled to be fatal. (*u*)

(*s*) Harris's case, 1 East. P. C. c. 8. s. 8. p. 415. and Addend. xviii.

(*t*) Davis's case, 1 Leach 493. 1 East. P. C. c. 8. s. 8. p. 414, 415. The point was reserved for the consideration of the judges, and was very much debated. Some of the judges thought that the word *wilful* was implied in the word *malicious*: but a great majority were clearly of opinion, that as the legislature had, by the special penning of the act, used both the words, "*wilfully* and *maliciously*," they must be understood as a description of the offence; and they thought that they were bound by former precedents in analogous cases. And see the cases collected in note (a) to this case, 1 Leach 494, as to the rule that though an indictment need not recite a general penal statute, it must bring the fact within the *express* prohibition of it.

(*u*) Durour's case, 1 Leach 351. 1 East. P. C. c. 8. s. 8. p. 415. The court said, that perhaps the averment was not necessary to the validity of the indictment, as the statute says, "who shall maliciously shoot at any person in "any dwelling house, *or other* "*place*;" but that as the averment was made, it must be proved as stated. However, in two subsequent cases of indictments for robbing in the dwelling houses of particular persons who were named, the convictions were held to be proper; though in one of them it did not appear who was the owner of the house, and in the other the Christian name of the owner of the house could not be proved. Pye's

The trial may be in any county in *England.*

By the fourteenth section of the statute the offences described in it may be "tried and determined in any county "in England, in such manner and form as if the fact had "been therein committed;" and it has been holden, that it is not necessary for the king to grant a special commission for such trial; but that a private prosecutor may prefer his indictment in such county in England as may appear to him to be most conducive to the ends of justice. (*w*) He cannot, however, exercise this right for the purposes of injustice and oppression, as the statute expressly gives it for the *better and more impartial* trial of the indictment. (*x*).

Attainder not to work corruption of blood, &c.

The fourteenth section also provides, that no attainder for any of the offences made felony by the act shall work corruption of blood, loss of dower, or forfeiture of lands or chattels.

26 Geo. II. c. 19. makes the beating or wounding persons shipwrecked with intent to kill them, &c. or putting out false lights to bring a ship into danger, felony without clergy.

The statute 26 Geo. II. c. 19. was passed for the purpose of repressing the enormities occasionally practised upon persons shipwrecked. The first section enacts, "that if any "person or persons shall beat or wound, with intent to kill "or destroy, or shall otherwise wilfully obstruct the escape "of any person endeavouring to save his or her life from "such ship or vessel, (i. e. any ship or vessel of his majesty's "subjects or others, which shall be in distress, or which "shall be wrecked, lost, stranded, or cast on shore, in any "part of his majesty's dominions) or the wreck thereof; or "if any person or persons shall put out any false light or "lights with intention to bring any ship or vessel into dan-"ger; then such person or persons so offending shall be "deemed guilty of felony; and being lawfully convicted "thereof, shall suffer death, as in cases of felony, without "benefit of clergy." (*y*)

case, *Warwick* 1790. *cor.* Thomson, B. 1 East. P. C. c. 16. s. 168. p. 785. and Johnstone's case, 1793. *cor.* Ashhurst, J. *Id.* c. 16. s. 168. p. 786.

(*w*) Mortis's case, 1 Leach 73. 2 Blac. R. 733. 1 East. P. C. c. 8. s. 9. p. 415.

(*x*) *Id. Ibid.*

(*y*) By s. 18. the act is not to extend to Scotland.

43 Geo. III. c. 58. Shooting at, or attempting to shoot, stabbing or cutting any person, with intent to murder, maim, &c. or to do grievous bodily harm, or to resist lawful apprehension, felony without clergy.

The statute 43 Geo. III. c. 58. (which is commonly called *Lord Ellenborough's act*) reciting, that divers cruel and barbarous outrages had been wickedly and wantonly committed, in divers parts of *England* and *Ireland*, upon the persons of his majesty's subjects, either with an intent to murder, or to rob, or to maim, disfigure, or disable, or to do other grievous bodily harm to such subjects, enacts, "that if any person or "persons shall, either in *England* or *Ireland*, wilfully, ma- "liciously, and unlawfully, shoot at any of his majesty's "subjects, or shall wilfully, maliciously, and unlawfully, "present, point, or level any kind of loaded fire-arms, at "any of his majesty's subjects, and attempt by drawing a "trigger, or in any other manner, to discharge the same at "or against his or their person or persons, or shall wilfully, "maliciously, and unlawfully stab or cut any of his majes- "ty's subjects, with intent in so doing, or by means thereof, "to murder, or rob, or to maim, disfigure, or disable, such "his majesty's subject or subjects, or with intent to do some "other grievous bodily harm to such his majesty's subject "or subjects, or with intent to obstruct, resist, or prevent "the lawful apprehension and detainer of the person or "persons so stabbing or cutting, or the lawful apprehen- "sion and detainer of any of his, her, or their accomplices, "for any offences for which he, she, or they may respectively "be liable by law to be apprehended, imprisoned, or de- "tained, or shall wilfully, maliciously, and unlawfully admi- "nister to, or cause to be administered to, or taken by, any "of his majesty's subjects, any deadly poison, or other nox- "ious and destructive substance or thing, with intent such "his majesty's subject or subjects thereby to murder, the "person or persons so offending, their counsellors, aiders, "and abettors, knowing of and privy to such offence, shall "be, and are hereby declared to be felons, and shall suffer "death, as in cases of felony, without benefit of clergy: "Provided always, that in case it shall appear on the trial "of any person or persons indicted for the wilfully, mali- "ciously, and unlawfully shooting at any of his majesty's "subjects, or for wilfully, maliciously, and unlawfully pre-

But if the stabbing or cutting were so committed that if death had ensued, it

" senting, pointing, or levelling, any kind of loaded fire-
" arms, at any of his majesty's subjects, and attempting by
" drawing a trigger, or in any other manner, to discharge
" the same at or against his or their person or persons, or
" for the wilfully, maliciously, and unlawfully stabbing or
" cutting any of his majesty's subjects, with such intent as
" aforesaid; that such acts *of stabbing or cutting* (z) were
" committed under such circumstances as that, if death had
" ensued therefrom, the same would not, in law, have
" amounted to the crime of murder, that then, and in every
" such case, the person or persons so indicted shall be
" deemed and taken to be not guilty of the felonies whereof
" they shall be so indicted, but be thereof acquitted."

would not have been murder, the party charged is to be acquitted.

This statute is more extensive in its application than the 22 and 23 Car. II. c. 1. (the Coventry act) which has been before mentioned, (*a*) as it does not make any *lying in wait* necessary to the completion of the offence: (*b*) nor need the intention of the offender be confined to a purpose of *maiming or disfiguring* the party; (*c*) as the words of the statute expressly include an intent to " disable, or do grievous bodily harm." But it seems, that though these words comprehend any severe injury done to any part of the body, yet, in the case of stabbing or cutting at least, the harm must be of such a nature and description that death might have ensued from it; and the act must be done under such circumstances, that, if death had ensued, the crime would have amounted to murder.

Construction of the statute.

(z) Either the words " of stabbing or cutting," should have been omitted, or words to the following effect should have been inserted in their stead:—" Of shooting at, " presenting, pointing, or levelling " and attempting to discharge such " fire-arms as aforesaid, or such " acts of stabbing or cutting." From a MS. note in the late Mr. J. Grose's copy of the MS. Summary, which has been communicated to the author, it appears, that it was the opinion of that learned judge, that the words " of stabbing or cutting" should have been omitted.

(*a*) *Ante*, 844, *et sequ.*

(*b*) *Ante*, 846.

(*c*) *Ante*, 849.

Akenhead's case. As to the words "grievous bodily harm," and the sort of injury contemplated by the statute.

A reported case upon this act states the following circumstances. The prosecutor and some other men had got hold of a woman, who, as they conceived, had been using another person ill, and said, that she deserved to be ducked in a trough which was near: but it did not appear that they intended to duck her. The prisoner, who was at some distance at the time, on being informed that they were using the woman ill, exclaimed, "I have got a good knife," rushed immediately to the place where she was, entered among the crowd, and instantly struck the prosecutor on the shoulder with a knife. The prosecutor turned round upon him; a struggle ensued between them; and in that struggle the prosecutor received other wounds. After they had fought for some time, the prisoner dropped the knife, and ran away. The wound upon the prosecutor's shoulder was about seven inches long and two deep; and the lap of one of his ears was cut. There was likewise a slight wound on the gland of his neck, and a cut on his left arm. Upon this evidence the counsel for the prisoner objected, that the first count of the indictment, which stated an intent to murder, &c. and the second count, which stated an intent to maim, disfigure, and disable, could not be supported; and that the only question was upon the third count, which stated an intent to do some grievous bodily harm. And upon this question he submitted, that the wounds were not of that kind from which grievous bodily harm could ensue; that the transaction was a scuffle in which a knife was used accidentally, without any settled design to "maim, disfigure, or disable," or to do "other grievous bodily harm" to the prosecutor; and also that the wounds were not inflicted in a part of the body which could produce such a consequence. Bayley J. entertained some doubts on the case; which appear to have proceeded, principally, on the grounds that the wounds were not in a vital part; that it was questionable whether the injury done was a grievous bodily harm contemplated by the act; and whether, if death had ensued, the crime would have been more than manslaughter. And,

taking all the circumstances of the case into consideration, he directed the jury to acquit the prisoner. (*d*)

As to the words "stab or cut."

The words "*stab or cut*" in the statute relate only to such wounds as are made by a sharp instrument; stabbing being properly a wounding with a pointed instrument, and cutting being a wounding with an instrument having a sharp edge. Thus, though a striking over the face with the sharp or claw part of a hammer has been holden to be a sufficient cutting within the act; yet it would have been otherwise, if the striking had been with the blunt end. (*e*) A blow with a square iron bar, which inflicted a contused or lacerated wound, has been holden not to be a cutting within the act. (*f*) And it was ruled, that a blow with the handle of a windlass was not a cutting within the act, though it made an incision. (*g*) The cutting must be expressly laid with the intent stated in the act; as it has been holden that an indictment for cutting with intent to do some grievous bodily harm, without saying, "in so doing, or by means thereof," was not sufficient. (*h*)

Ricketts's case. Where the wounding is charged to be done with intent to obstruct, &c. a lawful apprehension, it must appear that the offender had some notification of the

Where the offence is charged to have been committed with intent to obstruct, &c. a lawful apprehension, it must be shewn that the offender had some notification of the purpose for which he was apprehended before he inflicted the wound. Upon an indictment on this statute, it appeared that, in the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one Spilsbury; and that, the wheat being soon after found concealed in an adjoining field, Spilsbury Webb and

(*d*) Rex *v.* Akenhead, *Northumberland*, 1816, 1 Holt's N. P. R. 469.

(*e*) Atkinson's case, *York* Spr. Ass. 1806, 4 Blac. Com. 208. (ed. 1809,) note (1).

(*f*) Adams's case, *cor.* Lawrence, J. Old Bailey, Jan. Sess. 1808.

(*g*) *Anon. cor.* Dallas, C. J. and Burton, J. at *Chester*, 5 Evans's Col. Stat. Part V. Cl. iv. p. 334. note (2).

(*h*) *Anon. cor.* Dallas, C. J. and Burton, J. at *Chester*, *Id. Ibid.* note (3).

purpose for which he was apprehended.

others watched near the spot, expecting that the thief would come to carry it away, and that they should thus be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field, and lifted up the bag containing the wheat. They were immediately pursued; and Webb seized the prisoner, without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before Webb had spoken, the prisoner drew a knife, and cut him across the throat. Upon these facts Lawrence, J. held that, as Webb did not communicate to the prisoner the purpose for which he seized him, the case did not come within the statute; for if death had ensued, it would only have been manslaughter. But he said, that if a proper notification had been made before the cutting, the case would have assumed a different complexion. The prisoner was accordingly acquitted. (*i*)

Dyson's case. Where the wounding is charged to be done with the same intent, it is also necessary to shew that the person apprehending acted under proper authority.

It is also necessary, in proceeding upon the same clause of the statute, to shew that the person apprehending acted under proper authority. For, in a case where it appeared that the prisoner having previously cut a person on the cheek, several others, who were not present when the transaction took place, went to his house to apprehend him, without any warrant, and that upon their attempting to take him into custody, he inflicted the wound upon which the indictment was founded; Le Blanc, J. was of opinion, that the prosecution could not be sustained. He said, that to constitute an offence within this branch of the statute, there must be a resistance to a person having a lawful authority to apprehend the prisoner, in order to which the party must either be present when the offence is committed, or he must be armed with a warrant; and that this branch of the statute was intended to protect officers, and others armed

(*i*) Rex *v.* Ricketts, *Worcester*, Sum. Ass. 1811, *cor.* Lawrence, J. 3 Campb. 68. The prisoner was afterwards found guilty of larceny in stealing the wheat.

with authority, in the apprehension of persons guilty of robberies or other felonies. (*k*)

Shooting in a duel.

It has been suggested, that where an ineffectual exchange of shots takes place in a deliberate duel, both the parties may be guilty of the offence of malicious shooting within this statute; and the seconds be also guilty as principals in the second degree: but this is mentioned as not having been any where expressly decided. (*l*)

Conspiring or persuading to murder in *Ireland.*

This chapter may be concluded with the mention of the Irish statutes 36 Geo. III. c. 27. and 38 Geo. III. c. 57.; by the former of which the conspiring to murder any person, and by the latter of which, the proposing, soliciting, encouraging, persuading, or endeavouring to encourage or persuade to murder, are made capital felonies. (*m*)

(*k*) Rex *v.* Dyson, *cor.* Le Blanc, J. *York* Spr. Ass. 1816, 1 Starkie N. P. R. 246.

(*l*) 3 Chit. Crim. L. 848. note (*w*).

(*m*) 5 Evans's Col. Stat. Part V. Cl. iv. No. 19. in the note.

CHAPTER THE ELEVENTH.

Of Common and Aggravated Assaults.

SECTION I.

OF COMMON ASSAULTS.

Definition of an assault.

AN assault is an attempt or offer, with force and violence, to do a corporal hurt to another; as by striking at another with a stick or other weapon, or without a weapon, though the party striking misses his aim. So drawing a sword or bayonet, or even holding up a fist in a menacing manner, throwing a bottle or glass with intent to wound or strike, presenting a gun at a person who is within the distance to which the gun will carry, pointing a pitchfork at a person who is within reach, or any other similar act, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person of another, will amount to an assault. (*a*)

No words will amount to an assault.

But it appears to be now quite settled, though many ancient opinions were to the contrary, that no words whatsoever, be they ever so provoking, can amount to an assault.(*b*) And the words used at the time may so explain the intention of the party as to qualify his act, and prevent it from

(*a*) 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Assault and Battery*, (A). 3 Blac. Com. 120. 1 Burn. Just. *Assault and Battery*, I. 1 East. P. C. c. 8. s. 1. p. 406. Bull. N. P. 15. Selw. N. P. *Assault and Battery*, I.

(*b*) 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Assault and Battery* (A).

being deemed an assault: as where A. laid his hand upon his sword, and said, "If it were not the assize time, I would not take such language from you," it was holden not to be an assault, on the ground that he did not design to do the other party any corporal hurt at that time, and that a man's intention must operate with his act in constituting an assault.(*c*)

Of a battery.

A *battery* is more than an *attempt* to do a corporal hurt to another: but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude, or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law. (*d*) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. (*e*) It should be observed that every battery includes an assault. (*f*)

The injury need not be direct from the hand of the party assaulting.

The injury need not be effected directly by the hand of the party. Thus there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c. against the carriage of another person, and thereby causing bodily injury to the persons travelling in it. (*g*) And it seems that it is not necessary that the assault should be immediate; as where a defendant threw a lighted squib into a market place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was ad-

(*c*) Turberville *v.* Savage, 1 Mod. 3. S. C. 2 Keb. 545.

(*d*) 1 Bac. Ab. *Ass. & Bat.* (B) 1 Hawk. P. C. c. 62. s. 2.

(*e*) 4 Blac. Com. 120.

(*f*) Termes de la ley, *Battery*, 1 Hawk. P. C. c. 62. s. 1. 1 Bac. Ab. *Ass. & Batt.* (A)

(*g*) See the precedents for assaults of this kind in Cro. Circ. Comp. 65. 3 Chit. Crim. L. 823, 824, 825. 2 Starkie 388,389.

judged that this was actionable as an assault and battery. (*h*) And the same has been holden where a person pushed a drunken man against another, and thereby hurt him : (*i*) but if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable. (*k*).

Assault by exposing another to the inclemency of the weather.

There may be an assault also by exposing a person to the inclemency of the weather. Thus, in a case where an indictment against a mistress for not providing sufficient food and sustenance for a female servant, whereby the servant became sick and emaciated, was ruled to be bad, because it did not allege that the servant was of tender years, and under the dominion and controul of her mistress; it was suggested that the indictment also charged that the defendant exposed the servant to the inclemency of the weather; and it was holden that such exposure was an act in the nature of an assault, for which the defendant might be liable, whatever was the age of the servant. (*l*)

An assault may be by an unlawful imprisonment.

An *unlawful imprisonment* is also an assault; for it is a wrong done to the person of a man, for which, besides the private satisfaction given to the individual by action, the law also demands public vengeance, as it is a breach of the king's peace, a loss which the state sustains by the confinement of one of its members, and an infringement of the good order of society. (*m*) To constitute the injury of false

(*h*) Scott *v.* Shepherd, 2 Blac. Rep. 892, by three judges; Blackstone, J. *contra*, 3 Wils. 403. S.C.

(*i*) Short *v.* Lovejoy, *cor.* Lee, C. J. 1752. Bul. Ni. Pri. 16.

(*k*) *Id. Ibid.*

(*l*) Rex *v.* Ridley, *cor.* Lawrence, J. *Salop* Lent Ass. 1811. 2 Campb. 650, 653. The counsel for the prosecution admitted that they could not prove this charge in the indictment to any extent; and the defendant was accordingly acquitted. That negligence and harsh usage may be a means of committing murder, see *ante*, 620, 621.

(*m*) 1 Hawk. P.C. c. 60. s. 7. 4 Blac. Com. 218. And see precedents of indictments for assaults and false imprisonment. Cro. Circ. Comp.

imprisonment, there must be an unlawful detention of the person. With respect to the detention, it may be laid down that every confinement of the person, whether it be in a common prison, or in a private house, or by a forcible detaining in the public streets, will be sufficient. (*n*) And such detention will be unlawful unless there be some sufficient authority for it, arising either from some process from the courts of justice, or from some warrant of a legal officer, having power to commit under his hand and seal, and expressing the cause of such commitment; or arising from some other special cause sanctioned, for the necessity of the thing, either by common law or by act of parliament. (*o*) And the detention will be unlawful, though the warrant or process, upon which it is made, be regular, in case they are executed at an unlawful time, as on a Sunday; or in a place privileged from arrests, as in the verge of the king's court. (*p*) Especial provision is made concerning the arrest of foreign ambassadors, or other foreign public ministers, and their domestics, or domestic servants, by the statute 7 Ann, c. 12. which makes any process against them, or their goods and chattels, altogether void; and provides, that the persons prosecuting, soliciting, or executing, such process, shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment, as the Lord Chancellor, and the two Chief Justices, or any two of them, shall think fit. But no trader within the description of the bankrupt laws, who shall be in the service of any ambassador, or public minister, is to be privileged or protected by this act; nor is any one to be punished for arresting an ambassador's servant, unless the name of such servant be registered in the office of one of

61, 62. 2 Stark. 385, 386. 3 Chit. Crim. L. 835, *et sequ.* As to such false imprisonment as amounts to Kidnapping, &c. see *ante*, 837, *et sequ.*

(*n*) 2 Inst. 589. 4 Com. Dig. *Imprisonment.* (G) 3 Blac. Com. 127.

(*o*) 3 Blac. Com. 127.

(*p*) *Id. ibid.* 29 Car. II. c. 7. And see further as to unlawful imprisonments, 4 Com. Dig. *Imprisonment.* (H) 6 Bac. Ab. *Trespass* (D) 3. 2 Selw. N. P. *Imprisonment.*

the principal secretaries of state, and by him transmitted to the sheriffs of London and Middlesex, or their undersheriffs or deputies. (*q*)

Every imprisonment does not include a battery.

It has been supposed that every imprisonment includes a battery; (*r*) but this doctrine was denied in a recent case, where it was said by the court that it was absurd to contend that every imprisonment included a battery. (*s*)

The intention with which the act is done is material in the inquiry whether it will amount to an assault.

Whether the act shall amount to an assault must, in every case, be collected from the intention. Thus, in an action for an assault, where it appeared that the defendant and another person were fighting, when the plaintiff came up and took hold of the defendant by the collar, in order to separate the combatants, upon which the defendant beat the plaintiff, it was objected to the counsel for the plaintiff, who offered to enter into this evidence, that it ought to have been specially stated in the replication to the plea of son assault demesne: but the objection was overruled, on the ground that the evidence was not offered by way of justification, but for the purpose of shewing that there was not any assault, and that it was the quo animo which constituted an assault, which was matter to be left to the jury. (*t*) So to lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery. (*u*) And if the injury committed were accidental and undesigned, it will not amount to a battery. Thus, if one soldier hurts another by discharging a gun in exercise, it will not be a battery. (*v*)

(*q*) See as to the occasion of passing this act, 3 Blac. Com. 254, 255, 256. and, as to the construction of it, the cases collected in 2 Evans's Col. Stat. Part IV. Cl. III. No. 21.

(*r*) Bull. N.P. c. 4. p. 22. and the opinion was adopted by Lord Kenyon, in Oxley *v.* Flower and another, 2 Selw. N. P. *Imprisonment*, 1.

(*s*) Emmett *v.* Lyne, 1 New. Rep. 255.

(*t*) Griffin *v.* Parsons, *Gloucester* Lent Ass. 1754. Selw. N. P. *Ass. & Batt.* 33. Note (1).

(*u*) 1 Hawk. P.C. c. 62. s. 2. 1 Bac. Ab. *Ass. & Batt.* (B)

(*v*) Weaver *v.* Ward, Hob. 134. 2 Roll. Ab. 548. 1 Bac. Ab. *Ass. &*

And it is no battery if, by a sudden fright, a horse runs away with his rider, and runs against a man. (*w*) So where upon an indictment for throwing down skins into a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence, that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted. (*x*) It seems also that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity. (*y*)

Cases where the force used may be justified, and will not amount to an assault.

In some cases force used against the person of another may be justified, and will not amount to an assault and battery. Thus, if an officer having a warrant against one who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent, in a reasonable manner, chastise his child; or a master his servant, being actually in his service at the time; or a schoolmaster

Bal. B. But if the act were done without sufficient caution, the soldier would be liable to an action at the suit of the party injured: for no man will be excused from a trespass, unless it be shewn to have been caused by inevitable necessity, and entirely without his fault, Dickenson *v.* Watson, Sir T. Jones, 205, Underwood *v.* Hewson, 1 Str. 595. 2 Blac. R. 896. Selw. N. P. *Ass.* & *Bal.* 34.

(*w*) Gibbons *v.* Pepper, 4 Mod. 405. But if the horse running against the man were occasioned by a third person whipping him, such third person would be the trespasser. 1 Bac. Ab. *Ass.* & *Bal.* (B) And, upon the principles which have been before-mentioned, such an act in a third person, causing death to any one, may, under certain circumstances, amount to felony. *Ante*, 755.

(*x*) Rex *v.* Gill and another, 1 Str. 190.

(*y*) 1 Bac. Ab. *Ass.* & *Batt.* B. referring to Dalt. c. 22. Bro. Coron. 229. But in the notes to Bac. Ab. *ub. sup.* the case of Boulter *v.* Clark, *Abingdon* Ass. *cor.* Parker, C. B. Bul. N. P. 16. is referred to, in which it was ruled that it was no defence to allege that the plaintiff and defendant fought together by consent, the fighting itself being unlawful: and the case of Matthew *v.* Ollerton, Comb. 218. is also referred to as an authority, that if one license another to beat him such licence is no defence, because it is against the peace. And see *ante*, 756, *et sequ.* as to the criminality of some games or sports.

his scholar; or a gaoler his prisoner; or if one confine a friend who is mad, and bind and beat him, &c. in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault or battery will be committed by such acts. (*z*) So if A. beat B. (without wounding him, or throwing at him a dangerous weapon,) who is wrongfully endeavouring, with violence, to dispossess him of his lands, or of the goods, either of himself or of any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound, or maim, one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat, one who attempts to kill any stranger; in these cases also it seems that the party may justify the assault and battery. (*a*) It has been holden that a master may not justify an assault in defence of his servant, because he might have an action for the loss of his service: (*b*) but a different opinion has been entertained on this point; (*c*) and in a modern case Lord Mansfield said, "I "cannot say that a master interposing, when his servant is "assaulted, is not justifiable under the circumstances of the "case; as well as a servant interposing for his master: it "rests on the relation between master and servant." (*d*) It is said, that a servant may not justify beating another in defence of his master's son, though he were commanded to do so by the master, because he is not a servant to the son; and that for the like reason a tenant may not beat another in defence of his landlord. (*e*) A wife may justify an assault in defence of her husband. (*f*)

(*z*) 1 Hawk. P. C. c. 60. s. 23. 1 Bac. Ab. *Ass. & Bat.* (C)

(*a*) 1 Hawk. P. C. c. 60. s. 23. and the numerous authorities there cited. 1 Bac. Ab. *Ass. & Bat.* (C)

(*b*) Leward *v.* Baseley, 1 Ld. Raym. 62. 1 Salk. 407. Bull. N. P. 18.

(*c*) 1 Hawk. P. C. c. 60. s. 24.

(*d*) Tickel *v.* Read, Lofft. 215.

(*e*) 1 Hawk. P. C. c. 60. s. 24.

(*f*) Leward *v.* Baseley, 1 Ld. Raym. 62.

It has been holden that a defendant may justify even a *maihem*, if done by him as an officer in the army, for disobeying orders; and that he may give in evidence the sentence of a council at war, upon a petition against him by the plaintiff; and that if, by the sentence, the petition is dismissed, it will be conclusive evidence in favour of the defendant. (*g*)

Where there is a trespass without actual violence, there must be a request to depart or desist, before force is used.

It should be observed, with respect to an assault by a man on a party endeavouring to dispossess him of his land, that where the injury is a mere breach of a close, in contemplation of law, the defendant cannot justify a battery without a request to depart; but it is otherwise where any actual violence is committed, as it is lawful in such case to oppose force to force: therefore, if a person break down the gate, or come into a close *vi et armis*, the owner need not request him to be gone, but may lay hands on him immediately; for it is but returning violence with violence. (*h*) So if one come forcibly and take away another's goods, the owner may oppose him at once, for there is no time to make a request. (*i*) But, in general, unless there be violence in the trespass, a party should not, either in defence of his person, or his real or personal property, begin by striking the trespasser, but should request him to depart or desist, and if that is refused, should gently lay his hands upon him

(*g*) Lane *v.* Degberg, 11 W. III. *per* Treby, C. J. Bull. N. P. 19.

(*h*) Green *v.* Goddard, 2 Salk. 641. In a case of this kind, however, it should seem that the violence must be considerable, and continuing, in order to justify the application of force by the owner, without some previous request to depart; at least, if the force applied be more than would be justified under a *molliter manus imposuit*: for in a case of assault and battery, where the defendant pleaded *son assault demesne*, and the plaintiff replied that he was possessed of a certain close, and that the defendant broke the gate and chased his horses in the close, and that he, for the defending his possession, *molliter insultum fecit* upon the defendant, the replication was adjudged to be bad; and that it should have been *molliter manus imposuit*, as the plaintiff could not justify an assault in defence of his possession. Leward *v.* Baseley, 1 Ld. Raym. 62.

(*i*) Green *v.* Goddard, *Ibid.*

in the first instance, and not proceed with greater force than is made necessary by resistance. (*k*) Thus, where a churchwarden justified taking off the hat of a person who wore it in church, at the time of divine service, the plea stated, that he first requested the plaintiff to be uncovered, and that the plaintiff refused. (*l*) And in all cases where the force used is justified, as not amounting to an assault, under the particular circumstances of the case, it must appear that it was not greater than was reasonably necessary to accomplish the lawful purpose intended to be effected. (*m*) Therefore, though an offer to strike the defendant, first made by the prosecutor, is a sufficient assault by him to justify the defendant in striking, without waiting till the prosecutor had actually struck him first; yet even a prior assault will not justify a battery, if such battery be extreme; and it will be matter of evidence whether the retaliation by the defendant were excessive, and out of all proportion to the necessity or provocation received. (*n*)

Indictment.

The party injured may proceed against the defendant by action and indictment for the same assault, and the court in which the action is brought will not compel him to make his election to pursue either the one or the other; for the fine to the king, upon the criminal prosecution, and the damages to the party in the civil action, are perfectly distinct in their natures. (*o*)

One indictment may be preferred for assaulting two persons.

It appears to have been formerly holden that a person could not be prosecuted upon one indictment for assaulting two persons, each assault being a distinct offence. (*p*) But the case has been subsequently treated as one which was not well considered; and the court said, "Cannot the king

(*k*) Weaver *v.* Bush, 8 T. R. 78. 1 Selw. N. P. *Ass. & Bat.* 39, 40.

(*l*) Hawe *v.* Planner, 1 Saund. 13.

(*m*) 1 East. P. C. c. 8. s. 1. p. 406.

(*n*) Bull. N. P. 18. 1 East. P. C. c. 8. s. 1. p. 406.

(*o*) Jones *v.* Clay, 1 Bos. and Pul. 191. 1 Selw. N. P. *Ass. & Bat.* 33. note (2). 1 Hawk. P. C. c. 62. s. 4. 1 Bac. Ab *Ass. & Bat.* (D)

(*p*) Rex *v.* Clendon, 2 Ld. Raym. 1572. 2 Str. 870.

"call a man to account for a breach of the peace, because "he broke two heads instead of one?" (*q*)

Indictment of two counts, one for a riot, and the other for an assault, found by the grand jury a true bill as to the assault, and *ignoramus* as to the riot, holden good.

In a case where an indictment preferred before the grand jury consisted of two counts, one for a riot, the other for an assault, and the grand jury only found it a true bill as to the count for an assault, and indorsed *ignoramus* on the count for a riot, a motion was made on the part of the prosecutor to quash it, on the ground that the grand jury should have found the whole to have been a true bill, or have rejected the indictment altogether: but the court held, that as there were two distinct counts, the finding a true bill as to one count only, and rejecting the other, left the indictment, as to the count which the jury had affirmed, just as if there had originally been only that one count. (*r*)

Plea.

Whatever is a legal justification or excuse for an assault or imprisonment, such as son assault demesne, the arrest of a felon, &c. may, upon an indictment, be given in evidence under the general issue. (*s*)

Where the defendant has pleaded and entered into a recognizance to appear, *enter*, and try his traverse, he cannot be tried, without entering his traverse, under the gaol delivery he may withdraw his plea without entering his

A case has been decided, relating to the course of proceeding, where a defendant indicted for an assault has entered into a recognizance to appear, *enter*, and try his traverse. The defendant was in the first instance apprehended for an assault, carried before a magistrate, and admitted to bail, on the condition of his appearing at the ensuing assizes to answer such indictment as might be preferred against him; which condition he performed; and a bill of indictment being found against him at such assizes, he was arraigned, pleaded "Not Guilty," and entered into a recognizance to appear, *enter*, and try his traverse at the then next assizes. On the day before the opening of the commis-

(*q*) *Per Cur.* in Rex *v.* Benfield and Saunders, 2 Burr. 984.

(*r*) Rex *v.* Fieldhouse, Cowp. 325.

(*s*) 1 Hawk. P.C. c. 62. s. 3. 1 Bac. Ab. *Ass. and Bat.* (D). 1 East. P. C. c. 8. s. 1. p. 406. and c. 9. s. 1. p. 428.

traverse. And if, before he came in to plead he had given notice that he would at the same time try his traverse, he might have done so.

sion for the next assizes, he surrendered himself to prison in discharge of his bail; and to avoid paying for the issue-book, the entry of his traverse, and all other court fees, he endeavoured to be tried under the commission of gaol delivery: but his trial under this commission was opposed by the officers of the court, on the ground that by omitting to enter his traverse he had not performed the condition of his recognizance. The learned judge entertaining some doubts whether, as the defendant was in custody, he could refuse to try him, directed him to be tried, as in the case of any common gaol traverse: but, in order to settle the practice in future, he afterwards submitted the matter to the judges for their consideration. They were unanimously of opinion, that the defendant ought not to have been tried, as he had not performed the condition of the recognizance. But they all thought that he might have come in and moved to withdraw his plea of "Not Guilty," and have pleaded "Guilty," without entering his traverse, either on an agreement with the prosecutor, or on giving him proper notice of his intention so to do. And they likewise agreed, that if before he had come in to plead he had given the prosecutor ten days' notice that he would at the same time try his traverse, he might have done so. (*l*)

Verdict of guilty of the battery only.

As every battery includes an assault, (*u*) it follows, that on an indictment of assault and battery, in which the assault is ill laid, if the defendant be found guilty of the battery, it is sufficient. (*w*)

Punishment.

This offence is punishable as a misdemeanour: and the punishment usually inflicted is fine, imprisonment, and the finding of sureties to keep the peace. (*x*) But as the offence,

(*l*) Fry's case, *cor.* Nares, J. *Southampton* Ass. and considered of by the Judges, Hil. T. 1776, 1 Leach 111.

(*u*) *Ante*, 863.

(*w*) 1 Hawk. P. C. c. 62. s. 1.

(*x*) 4 Blac. Com. 217. 1 East. P. C. c. 8. s. 1. p. 406. and c. 9. s. 1. p. 428.

though undoubtedly in some degree concerning the public, principally and more immediately affects an individual, the defendant is frequently permitted by the court *to speak with the prosecutor*, after conviction and before any judgment is pronounced; and if the prosecutor declares himself satisfied, a trivial punishment, generally a fine of a shilling, is inflicted. (*y*)

SECTION II.

OF AGGRAVATED ASSAULTS.

Attempts to murder, or do some great bodily harm, (*a*) and assaults with intent to ravish, (*b*) or to commit an unnatural crime, (*c*) have been already noticed. Also assaults occurring in the obstruction of officers executing process (*d*) in effecting a rescue, (*e*) in the obstruction of revenue officers, (*f*) and in the hindering the exportation or circulation of corn, (*g*) have been mentioned in the course of the work. The aggravated assaults which remain to be noticed in this place, are principally such as have been made the subject of particular legislative provision; and the peculiar aggravation appears to arise, either from the place in which, or the person upon whom, the assault is committed, or else from the great criminality of the purpose or object intended to be effected.

5 and 6 Edw. VI. c. 4. s. 2. Smiting, or laying violent hands in a *church* or *church-yard.*

The statute 5 and 6 Edw. VI. c. 4. relates to disturbances in *churches and church-yards;* and the second and third sections of the statute make particular provision for the punishment of assaults committed in those places. The second section enacts, " that if any person or persons shall smite,

(*y*) *Ante*, 211.
(*a*) *Ante*, 841, *et sequ.*
(*b*) *Ante*, 809, 810.
(*c*) *Ante*, 816.
(*d*) *Ante*, 519, *et sequ.*
(*e*) *Ante*, 389, 522, 553, *et sequ.*
(*f*) *Ante*, 160, *et sequ.*
(*g*) *Ante*, 189, *et sequ.*

"or lay violent hands upon any other, either in any church "or church-yard," every person so offending shall be deemed excommunicate. The third section enacts, "that if any "person shall maliciously strike any person with any weapon "in any church or church-yard, or shall draw any weapon "in any church or church-yard to the intent to strike ano- "ther with the same weapon," every person so offending shall be adjudged to have one of his ears cut off; and, if he have no ears, to be marked in the cheek with a hot iron having the letter F. therein, to denote him as a fray maker; and that he shall also be and stand excommunicated.

S. 3. Striking with a weapon in a church or church-yard, or drawing one with intent to strike.

Some points upon the construction of this statute have been mentioned in a former part of the work; where it was stated that cathedral churches and churchyards are within it; that it will be no excuse for a person who strikes another in a church, &c. to shew that the other assaulted him; and that churchwardens, and perhaps private persons, who whip boys for playing in the church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands upon those who disturb the performance of any part of divine service, and turn them out of the church, are not within the meaning of the statute. (*h*)

Indictment upon 5 and 6 Edw. VI. c. 4.

With respect to the indictment upon this statute, it may be here mentioned, that where it was charged that the defendant drew his dagger in a church, without stating that he drew it with intent to stab, the indictment was holden void as to the statute; and, upon its being contended that it was good for the assault at common law, the court held, that it was altogether bad, as the conclusion was *contra formam statuti*. (*i*) It is clear that the indictment should allege, either

(*h*) *Ante*, 402. And see *ante*, 400, 401, the statute cited more at length.

(*i*) Perchall's case, 2 Leon. 188. Penhallo's case, Cro. Eliz. 231. And in Cholmley's case, Cro. Car. 464, 465, all the judges, except Jones, J. held that the indictment could not be good for a battery at common law, because it concluded

that the party struck with the weapon, or that he drew the weapon with intent to strike. (*k*)

33 Hen. VIII. c. 12. Malicious striking in the *king's palaces*, by which blood is shed.

Contempts against the *king's palaces* have always been looked upon as high misprisions, and, by the ancient law before the conquest, fighting in the king's palaces, or before the king's judges, was punished with death. (*l*) The statute 33 Hen. VIII. c. 12. enacts, that all malicious strikings by which blood is shed, against the king's peace, within any of the king's palaces or houses, or any other house at such time as the royal person shall happen to be there demurrant and abiding, shall be inquired of by the Lord Steward; and that the offender shall be punished by perpetual imprisonment, and fine, at the king's pleasure, and also with the loss of his right hand. The execution of the latter part of the sentence, with solemn and due circumstance, is prescribed by the particular and minute provisions of the statute. (*m*) It is clear that, unless the person striking in the king's palace draw blood, he will not be liable to the punishment under this statute. (*n*) But it seems questionable, from the construction of the whole act and the general tenor of the books, whether striking in a palace, wherein the king is not at the time actually resident, be within the statute. (*o*)

contra formam statuti. But, according to more recent decisions, it seems that such a conclusion would now be considered as mere surplusage, 1 Stark. 217. Mathews's case, 2 Leach 585. 1 Hawk. P. C. c. 30. s. 9.

(*k*) Cholmley's case, Cro. Car. 464, 465. 2 Hale 171. 1 East. P. C. c. 8. s. 4. p. 411.

(*l*) 4 Blac. Com. 124.

(*m*) 33 Hen. VIII. c. 12. s. 8. to s. 18.

(*n*) 3 Inst. 140. 1 Hawk. P. C. c. 21. s. 3.

(*o*) 1 Hawk. P. C. c. 21. s. 2. where it is said, that the instance given in 3 Inst. 140. of a person's hand being cut off for striking in the Tower, is not warranted by the record. The punishment of cutting off the hand is undoubtedly one of great cruelty; and it is therefore a satisfaction to be able to speak of it as of rare occurrence in the history of the administration of our criminal laws, even in the more barbarous ages. It is said, that not more than ten cases of the kind occur in our books. In the year

Drawing a weapon, or striking in the king's *courts of justice.*

Striking in the king's superior *courts of justice* in Westminster-hall, or in any other place, while the courts are sitting, whether the court of chancery, exchequer, king's bench, or common pleas, or before justices of assize or oyer and terminer, is made still more penal than even in the king's palace; perhaps for the reason that, those courts being anciently held in the king's palace and before the king himself, striking there included the former contempt against the king's palace, and something more, namely, the disturbance of public justice. (*p*) So that, though striking in the king's palace is not punished with the loss of the offender's hand, unless some blood be drawn, nor even then with loss of lands or goods, the drawing of a weapon only upon a judge or justice in such courts, though the party strike not, is a great misprision, punishable by the loss of the right hand, perpetual imprisonment, and forfeiture of the party's lands during life, and of his goods and chattels. (*q*) And a party is liable to a similar punishment, if, in the same courts, and within their view, he strike a juror or any other person, either with a weapon, or with hand, shoulder, elbow, or foot: but he is not liable to such punishment if he make an assault only, and do not strike. (*r*) And one who is guilty of this offence cannot excuse himself

1541 (33 Hen. VIII.) the sentence of Sir Edmond Knevet to undergo this punishment, gave occasion to a display of loyal devotion, which cannot but be read with interest. Sir Edmond being brought in to undergo his sentence, "desired that "the king of his benign grace "would pardon him of his right "hand, and take the left: for "(quoth he) if my right hand be "spared, I may hereafter do such "good service to his grace as shall "please him to appoint. Of this sub-"mission and request the justices "forthwith informed the king, who, "of his goodness, considering the "gentle heart of the said Edmond, "and the good report of lords and "ladies, granted him pardon, that "he should lose neither hand, land, "nor goods, but should go free at "liberty." Sir Edmond Knevet's case, 11 St. Tri. (Hargr. Ed.) 16.

(*p*) 3 Inst. 140. 4 Blac. Com. 125.

(*q*) Staundf. 38. 3 Inst. 140, 141. 1 Hawk. P. C. c. 21. s. 3. 4 Blac. Com. 125. 1 East. P. C. c. 8. s. 3. p. 408.

(*r*) *Id. Ibid.*

by shewing that the person so struck by him gave the first assault. (*s*)

Lord Thanet's case. Noli prosequi entered by the attorney general as to the judgment of amputation, &c.

In a case of modern occurrence, the three first counts of the information set forth a special commission for the trial of Arthur O'Connor and others for high treason; and that, pending the sessions, after the acquittal of O'Connor, and before any order or direction had been made by the court for his discharge, the defendants, in open court, &c. made a great riot, and riotously attempted to rescue him out of the custody of the sheriff, to whose custody he had been assigned by the justices and commissioners; and, the better to effect such rescue and escape, did, at the said sessions, in open court, and in the presence of the said justices and commissioners, riotously, &c. make an assault on one J. R., and did then and there "*beat*, *bruise*, *wound*," and ill treat the said J. R., and thereby impede and obstruct the said justices, &c. There were two other counts in the information; the one for riotously interrupting and obstructing the justices in the holding of the session, and the other for a common riot. (*t*) Two of the defendants having been found guilty generally, considerable doubt was intimated by Lord Kenyon, whether the court were not bound to pass the judgment of amputation, &c. for the offence, as laid in the three first counts; and the matter stood over for consideration. But before the defendants were again brought up to receive judgment, the attorney general said, that he had received the royal command and warrant under the sign manual, whereby he was authorised to enter a noli prosequi, as to those parts of the information on which any doubt had arisen, or might arise, whether the judgment thereon were discretionary in the court, and pray judgment only on such charges as left the judgment in their discretion: and, accordingly, a noli prosequi was entered on the three first

(*s*) 1 Hawk. P. C. c. 21. s. 4.

(*t*) See the precedent of this information, 2 Chit. Crim. L. 208. *et sequ.*

counts; and on the others the court gave judgment against the defendants, of fine, imprisonment, and sureties. (*u*)

Rescuing a prisoner from such courts without striking.

A person who rescues a prisoner from any of the courts which have been mentioned, without striking a blow, is punished with perpetual imprisonment, and forfeiture of goods, and of the profits of lands during life; for this offence is in its nature similar to the other: but as it differs in this, that no blow is actually given, the amputation of the hand is excused. (*w*) And, for the like reason, an affray or riot near the said courts, but out of their actual view, is punishable by fine and imprisonment during pleasure, but not with the loss of the hand. (*x*)

Inferior courts.

Though an assault in any of the king's inferior courts of justice would not subject the offender to lose his hand; (*y*) yet, upon an indictment for such an assault, the circumstances under which it was committed would, doubtless, be considered as matter of great aggravation. And any affray, or contemptuous behaviour in those courts, is punishable with a fine, by the judges there sitting. (*z*)

Indictment.

It is said that, in order to warrant the higher judgment, the offence must be charged to have been committed in the presence of the king, or of the justices. (*a*) And it seems, also, that in order to warrant such judgment, the indictment ought expressly to charge a stroke; though it does not appear whether any technical word be necessary to be used for that purpose. (*b*)

(*u*) Rex *v.* Lord Thanet and others, B. R. Trin. 39 G. III. 1 East. P. C. c. 8 s. 3. p. 408, 409, 410.

(*w*) 1 Hawk. P. C. c. 21. s. 5. 4 Blac. Com. 125.

(*x*) 1 Hawk. P. C. c. 21. s. 6. 4 Blac. Com. 125. *Ante*, 389.

(*y*) 3 Inst. 141. 1 Hawk. P. C. c. 21. s. 10.

(*z*) 4 Blac. Com. 126. 1 Hawk. P. C. c. 21. s. 10.

(*a*) 1 East. P. C. c. 8. s. 3. p. 410. 1 Hawk. P. C. c. 21. s. 3.

(*b*) 1 East. P. C. c. 8. s. 3. referring to 1 Sid. 211.

9 Anne, c. 16. Assaulting and striking, &c. a *privy counsellor*, in the execution of his office.

The statute 9 Anne, c. 16. makes the assaulting and striking a *privy counsellor*, in the execution of his office, highly penal. It enacts, "that if any person or persons shall unlawfully attempt to kill, or shall unlawfully assault and strike or wound any person, being one of the most honourable privy council of her majesty, her heirs, or successors, when in the execution of his office of a privy counsellor, in council, or in any committee of council," the person or persons so offending, being convicted, shall be felons, and shall suffer death, as in cases of felony, without benefit of clergy.

11 Hen. VI. c. 11. As to assaults upon lords and members of parliament: and 5 Hen. IV. c. 6. as to assaults upon the servants of members of parliament.

The statute 11 Hen. VI. c. 11. enacts, "that if any assault or affray be made to any lord spiritual or temporal, knight of the shire, citizen, or burgess, come to the parliament, or to the council of the king, by his commandment, and there being and attending at the parliament or council," that then proclamation shall be made for three several days in the most open place of the town, where the assault or affray shall be made, that the offender yield himself before the king in his bench within a quarter of a year, if it be in the time of the term, otherwise at the next day in term after the quarter; and if he do not, that he be attainted of the deed, pay double damages to the party aggrieved, and make fine and ransom at the king's will: and that if he come, and be found guilty, that he shall pay to the party grieved his double damages, and make fine and ransom at the king's will. A prior statute, 5 Hen. IV. c. 6. had made a provision nearly similar for the punishment of persons who should assault the servants of members of parliament.

Assaulting a *clergyman*. 9 Edw. II. c. 3.

The beating a clerk in orders, or *clergyman*, is also an assault of an aggravated nature, on account of the respect and reverence due to the sacred character of such person, as the minister and ambassador of peace. And it may be visited with severe penalties; for, as the statute 9 Edw. II. c. 3. enacts that, if any person lay violent hands upon a clerk, the amends for the peace broken shall be before the king, that

is, by indictment in the king's courts; and, as the assailant may also be sued before the bishop, that excommunication or bodily penance may be imposed; it appears that a person assaulting a clergyman is subject to three kinds of prosecution, all of which may be pursued for one and the same offence, namely, an indictment for the breach of the king's peace, a civil action for the special damage, and a suit in the ecclesiastical court. (*c*)

Assault with intent to *commit a robbery.* 7 G. II. c. 21.

Amongst the principal of those assaults, the aggravated nature of which may be said to arise from the great criminality of the object intended to be effected, is an assault upon a person with a felonious intent to *commit a robbery.* This offence was, at common law, punishable only as a misdemeanour; but the statute 7 Geo. II. c. 21. makes it a felony punishable by transportation. That statute enacts, "that "if any person or persons shall, with any offensive weapon "or instrument, unlawfully and maliciously assault, or shall, "by menaces, or in or by any forcible or violent manner, "demand any money, goods, or chattels, of or from any "other person or persons, with a felonious intent to rob or "commit robbery upon such person or persons;" all such offenders being lawfully convicted, shall be adjudged guilty of felony, and be subject and liable to be transported as in cases of felony, for the space of seven years.

Such offenders returning from transportation to suffer death without benefit of clergy.

The second section enacts that if any such offenders, "who shall be ordered for transportation by virtue of the "act, shall break gaol, or escape, before such transporta- "tion, or shall return into any part of Great Britain or Ire- "land, before the expiration of the said seven years," they

(*c*) 4 Blac. Com. 217. where it is said that the suit in the ecclesiastical court is, first, pro correctione et salute animæ, by *enjoining* penance; and then again for such sum of money as shall be agreed upon for *taking off* the penance enjoined; it being usual in those courts to exchange their spiritual censures for a round compensation in money; perhaps because poverty is generally esteemed by moralists the best medicine pro salute animæ.

shall, upon being thereof lawfully convicted, suffer death as felons, and have execution awarded against them as persons attainted of felony without benefit of clergy.

Construction of the statute. Two offences: the one where a person with an offensive weapon unlawfully and maliciously assaults with intent to rob; the other where a person by menaces, or in or by any forcible or violent manner, demands any money, &c. with intent to rob. Case of Jackson and Randall.

It seems that the statute describes two distinct offences; the one, where a person, with an offensive weapon or instrument, unlawfully and maliciously assaults another, with a felonious intent to rob; and the other, where a person, by menaces, or in or by any forcible or violent manner, demands any money, goods, &c. from another, with a felonious intent to rob. In a case where the indictment stated that the prisoners "in and upon one A. G. unlawfully, maliciously, and feloniously, did make an assault, and him the said A. G. then and there unlawfully and maliciously did menace, by then and there threatening and menacing to blow the said A. G.'s brains out, with a felonious intent the monies of the said A. G. from the person and against the will of him the said A. G.. then and there feloniously to steal, take, and carry away, against the statute, &c.," it was moved in arrest of judgment, that the offence was not properly described; that the statute created two distinct species of this offence of an intent to commit robbery; namely, first, when that intent is manifested by a malicious assault with an offensive weapon or instrument; and, secondly, where it is manifested by a demand of money or goods, made either by menaces, or in any forcible or violent manner. The judgment was respited, and the case submitted to the consideration of the judges, upon the point "whether an indictment under this statute, in describing the manner in which the offence was committed, must not necessarily state, either that the assault was made with an offensive weapon, with a felonious intent to rob, &c.; *or*, that by menaces, or in or by a forcible or violent manner, a demand of monies or goods was made with a felonious intent, &c." the words of the act being throughout in the disjunctive. The opinion of the judges was afterwards declared to be "that the indictment was insufficient in not having stated that the assault was made with an offensive

"weapon, *or* that any demand was made of money or goods; "and that therefore no judgment could be given upon it: "for that it is necessary, in point of law, that an indictment "on any particular act of parliament should strictly follow "the words of the act; and that the court cannot supply, from "any other circumstances, a sufficient description of the of-"fence." (*d*)

So where a defendant was committed, for that "with force "and arms he made an assault on the prosecutor with intent "feloniously to steal, take, and carry away, from the per-"son, &c." it was moved to discharge him on bail, because the commitment did not specify any offence within this statute; as it did not charge him either with having made an assault with an offensive weapon, *or* with having by menaces, or in a violent manner, demanded money, &c. of the prosecutor, which were the offences mentioned in the act: and it was stated that the latter part of the commitment was also objectionable, in not charging the defendant with a felonious intent to rob, but merely with an intent feloniously to steal, take, and carry away. And the court, after some consideration, ordered the defendant to be bailed. (*e*)

As to the offensive weapon or instrument.

With respect to what shall be deemed "an offensive weapon or instrument" within this statute, several cases will apply which have been cited in a former part of this work, upon the construction of the words "offensive weapon," in a statute relating to offences against the revenue laws. (*f*) It may here be added, that from a case upon the statute now under consideration, where the indictment was for assaulting with a certain offensive weapon called a wooden staff, and the evidence proved a violent blow from a great stone, as it

(*d*) Jackson and Randall, (case of) O. B. 1783. 1 Leach. 267. 1 East. P. C. c. 8. s. 12. p. 419, 420. and see 1 East. P. C. c. 8. s. 11. p. 417.

(*e*) Rex *v.* Remnant, 5 T. R. 169. 2 Leach 583. 1 Hawk. P. C. c. 55. s. 7.

(*f*) Ante, 167.

was holden that the conviction of the prisoner was proper, (*g*) it seems to follow that both a wooden staff and a great stone are offensive weapons or instruments, within the meaning of the statute. The ground upon which the judges held, in this case, that the evidence was sufficient to maintain the charge in the indictment was, that the weapon laid in the indictment and the weapon proved produce the same sort of mischief, namely, by blows and bruises; and that the description would have been sufficient, upon an indictment for murder. (*h*)

The words *unlawfully and maliciously* seem to be an essential part of the description of the offence of assaulting, with an offensive weapon, with intent to rob.

It seems that the words "unlawfully and maliciously" form an essential part of the description of the offence of assaulting with an offensive weapon with intent to rob. An indictment stated, that the prisoner, "with a certain offen- "sive weapon or instrument called a stick, in and upon "J. R. feloniously did make an assault, and did then and "there, in a forcible and violent manner, feloniously de- "mand the goods, &c. of him the said J. R. with a felo- "nious intent to rob him, &c. and his goods, &c. from his "person, and against his will feloniously to steal, take, and "carry away against the statute, &c." The facts were, that the prisoner met the prosecutor in the highway, held up a large club to him, and bid him "stand and deliver;" that he was resisted, and afterwards ran away: and upon these facts he was found guilty. But as the indictment, in charging him with having assaulted the prosecutor with an offensive weapon, did not lay it to have been done "unlawfully and maliciously," judgment was respited in order to submit the point to the consideration of the judges. Their opinion was, that the conviction was right; the act being in the disjunctive, and an offence within the statute being well laid

(*g*) Sharwin's case, *Oakham*, 1785, 1 East. P. C. c. 8. s. 13. p. 421. *post.* 886, 887.

(*h*) *Id. Ibid.* In Pegge's case, which immediately follows, and in Monteth's case, *post.* 888, the indictment stated the assault to have been made with an offensive weapon called a *stick*.

in the latter part of the indictment, without the words unlawfully and maliciously. (*i*) But it is observed, upon this case, that it seems to admit, that where the assault is the only offence charged within the act, it must be laid to be done *unlawfully and maliciously*, as well as feloniously. (*k*)

The assault must be made upon the person intended to be robbed. Thomas's case.

It must appear, that the assault was made upon the person intended to be robbed; as was decided in the following case. The prisoner was indicted for assaulting one John Lowe, with an offensive weapon, with intent to rob him. Mr. Lowe's evidence was, that between ten and eleven o'clock at night, he was travelling along the road in a post-chaise, when the chaise suddenly stopped, and he saw a man with his arm extended towards the *post-boy*, and heard him swear many bitter oaths with great violence, but did not hear him make any demand of money; and the post-boy swore, that the prisoner followed the chaise for some time, and at last presented a pistol *at him*, and bid him stop, using at the same time many violent oaths; that he immediately stopped the chaise, and the prisoner turned towards it, but perceived that he was pursued, and immediately rode away without saying or doing any thing to Mr. Lowe, who was in the chaise. The court held, that this evidence did not support the indictment, which charged an intent to rob Mr. Lowe, the gentleman in the chaise. Another indictment was then preferred against the prisoner, laying the assault with intent to rob the *post-boy:* but the same evidence being again given on the second trial, the court held that it would not maintain the indictment; that it was clear that the prisoner did not mean to rob the post-boy, for when he presented the pistol to him, and bid him stop, he made no demand upon him, but went towards the person in the chaise. (*l*)

(*i*) Pegge's case, 1 East. P. C. c. 8. s. 12. p. 420.

(*k*) 1 East. P C. c. 8. s. 12. p. 420. and see Davis's case, *ante*, 854.

(*l*) Thomas's case, O. B. 1784, 1 Leach 330. 1 East. P. C. c. 8. s. 11. p. 418. where it is observed, that perhaps this may be agreeable to the strict construction of the statute, which has the word of refer-

A case is reported, which would seem to lead to the conclusion, that even upon an indictment for the offence first mentioned in the statute, namely, the assault with an offensive weapon with intent to rob, it is necessary to shew that intent by proving an *actual demand* of money, &c. to have been made by the prisoner. The indictment was for assaulting the prosecutor with a pistol, with intent to rob him; and, by the evidence, it appeared that the prosecutor, a coachman, was driving his coach along the road, and that the prisoner presented a pistol at him while he sat on his box, and called out to him to stop; but did not expressly make any demand of money. And upon this it is said, that the court held that the case was not within the meaning of the act; that a demand of money, or other property, must be made to constitute the offence; and that though a demand may be made by action as well as speech, as by a deaf and dumb man stopping a carriage, and putting his hat into it with one hand, and holding at the same time a pistol offensively with the other, yet the action must be plain, and unequivocally import a demand; and that in the present case no motion or offer to demand the prosecutor's property was made. (*m*) But this case has been doubted; (*n*) and it is observed, that the words of the statute are in the *disjunctive;* and that where it is proved that the prisoner assaulted the prosecutor with a felonious intent to rob him (which is a question for the jury) the case is brought expressly within the words, as well as the spirit, of the act. (*o*) It is suggested also, upon this case, that as the prosecutor was a *coachman*, and the indictment charged an intent to rob *him*, it might have appeared to the court that he was not the party intended to be robbed; (*p*) and we have seen that it

Where the indictment is for an assault with an offensive weapon with an intent to rob, it is not necessary to prove an actual demand of money or other property.

ence *such*. And in 1 Hawk. P. C. c. 55. 4. Thomas's case is cited, and the expression *such person* relied upon in support of the same construction.

(*m*) Parfait's case, O. B. 1740, 1 Leach 19. 1 East. P. C. c. 8. s. 11. p. 416, 417. 1 Hawk. P. C. c. 55. s. 3.

(*n*) 1 East. P. C. c. 8. s. 11. p. 417.

(*o*) *Id. Ibid.* Jackson and Randall, (case of) *ante*, 881, 882.

(*p*) 1 East. P. C. c. 8. s. 11. p. 418.

is necessary that the assault should be made upon the person intended to be robbed. (*q*) Other cases, however, appear to put the construction in this matter beyond doubt, and shew that an actual demand of money, &c. is not necessary upon the first clause of the statute. Two men were indicted for a felonious assault upon the prosecutor, with a certain offensive weapon called a pistol, with a felonious intent to rob him. The evidence was, that the prisoners rushed out of a hedge upon the prosecutor, who was the driver of a returning chaise, as he was passing along the road; and one of them, presenting a pistol to him, bid him stop, which he did, but called out for assistance; upon which one of the prisoners threatened to blow his brains out if he called out any more: but he continued to call, and presently obtained assistance, and took the men, *who had made no demand of money.* Upon this evidence the prisoners were convicted, and transported. (*r*) In a subsequent case, the indictment against the prisoner charged him with having, with an offensive weapon, feloniously made an assault upon the prosecutor, with a felonious intent to rob him. The evidence was that, while the prosecutor and another person were riding together in the highway, the prosecutor received a violent blow from a great stone, which was thrown by the prisoner from the hedge; that the prisoner then ran across a field, and was followed by the prosecutor, who asked him how he could be such a villain as to throw the stone; on which the prisoner threatened the prosecutor, ran to him, and struck him violently with a staff, till at length he was overcome and secured. The prisoner's face was blacked, and he denied his name; but on being questioned afterwards as to his motive, he said he was very poor, and wanted half a guinea to pay his brewer. *He did not ask for money or goods.* This case was submitted to the judges, upon a question relating to the form

(*q*) Thomas's case, *ante*, 884.

(*r*) Rex *v.* Trusty and Howard, O. B. 1783, 1 East. P. C. c. 8. s. 11. p. 418, 419.

of the indictment, and they held the conviction proper; (*s*) but no objection was taken on behalf of the prisoner, on the ground of its being necessary to prove an actual demand of money, or other property. (*t*)

And it seems that, even in cases where a demand must be proved, an actual or express demand by words is not necessary.

Even in cases where it may be necessary to prove a demand, as where the indictment proceeds upon the second clause of the statute, and charges the prisoner with assaulting, and by menaces, or in or by any forcible or violent manner, *demanding* money, &c. with a felonious intent to rob, it seems to be the better opinion, that an express demand of money by words is not necessary; and that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand of money to be left to the jury. It is observed, that the unfortunate sufferer understands the language but too well; and the question is put, "Why must "courts of justice be supposed ignorant of that which com- "mon experience makes notorious to all men?"(*u*) The statute too seems to include a demand made by such menaces or forcible violent demeanour, as may explain the purpose and intent of the party, though they may not be directly expressed in words. And in one case the court appears to have considered, that an *actual demand* is not necessary; and that whether there was a demand or not, is a fact for the consideration of the jury, under all the circumstances of the case. (*w*)

The intent to rob is a material part of the offences upon The intent to

(*s*) *Ante*, 882, 883.

(*t*) Sharwin's case, *Oakham*, 1785, *cor.* Gould, J. 1 East. P. C. c. 8. s. 13. p. 421. And see also the case of Jackson and Randall, *ante*, 882. in which an indictment was holden to be insufficient, because it did not state, either that the assault was made with an offensive weapon, *or* that any demand was made: thereby clearly implying, that a statement of an assault with an offensive weapon, with intent, &c. would have been sufficient.

(*u*) 1 East. P. C. c. 8. s. 11. p. 417.

(*w*) Jackson and Randall (case of), 1 Leach 269, *ante*, 881, 822.

rob is a material part of the offences, and must be properly alleged in the indictment.

this statute, and it must be properly alleged in the indictment. In a case where the indictment stated the assault to have been made with a certain offensive weapon called a wooden stick, with intent the goods, monies, &c. of the prosecutor, "from his person and against his will feloniously "to *steal*, take, and carry away," it was holden to be bad, as it did not contain a statement of force and violence. The prisoner was accordingly discharged from this indictment, and a new one was preferred against him, laying the assault as before, but stating the intent to be, the monies of the prosecutor, "from his person and against his will, felo- "niously and *violently* to steal, take, and carry away;" upon which indictment he was convicted. (*x*) So, in a case which has been already mentioned, of a commitment for an offence against this statute, one of the objections upon which it was moved that the prisoner might be bailed was, that the commitment did not charge the defendant with a felonious intent to *rob*, but merely with an intent feloniously to steal, take and carry away. (*y*)

Assault with intent to spoil garments. 6 G. I. c. 23. s. 11.

Another species of aggravated assaults is, where an assault is made with intent to spoil the garments or cloaths of the person assaulted. The statute 6 Geo. I. c. 23. s. 11. provided for the punishment of this offence; and the enactment is said to have been occasioned by the insolence of certain weavers and others, who, upon the introduction of some Indian fashions, prejudicial to their own manufactures, made it their practice to deface them, either by open outrage, by privily cutting, or by casting *aqua fortis* in the streets upon such as wore them. (*z*) The statute enacts, "that if any person or persons shall wilfully and maliciously "assault any person or persons in the public streets or high- "ways, with an intent to tear, spoil, cut, burn, or deface,

(*x*) Monteth's case, O. B. 1795, 2 Leach 702. 1 East. P. C. c. 8. s. 12. p. 420, 421.

(*y*) Rex *v.* Remnant, 5 T. R. 169. 2 Leach 583, *ante*, 882. 1 Hawk. P. C. c. 55. s. 8.

(*z*) 4 Blac. Com. 246.

" and shall tear, spoil, cut, burn, or deface the garments or " cloaths of such person or persons, that then all and every " person and persons so offending, being thereof lawfully " convicted, shall be, and be adjudged to be guilty of fe- " lony; and every such felon and felons shall be subject and " liable to the like pains and penalties, as in case of fe- " lony; and the courts by and before whom he, she, or " they shall be tried, shall have full power and authority of " transporting such felons for the space of seven years, upon " the like terms and conditions as are given, directed, " or enacted, by this or the before recited act (4 Geo. I. c. " 11.)"

Construction of the statute.

Though it is nearly a century since the statute was made, the books furnish only one case upon the construction of this section of it; and a reason for referring that case, in the year 1790, to the consideration of the judges, is stated to have been, that it was the first that had occurred upon the act of parliament. (*a*)

Williams's case. The primary intention must be a tearing, spoiling, cutting, &c. of the clothes, and not a wounding of the person.

In that case the prisoner was indicted for an assault of the kind mentioned in the statute upon a Miss Anne Porter. The evidence, in substance, was, that the prisoner had frequently, before the time of the assault, accosted the prosecutrix, and her sister Miss Sarah Porter, when he happened to meet them, insulting them, and using the most indecent language; that on the day of the assault the Miss Porters were walking up St. James's street, when he came immediately behind Miss Sarah Porter, muttered gross language, and, upon her making an exclamation of alarm, gave her a violent blow on the back part of her head; that the Miss Porters then ran as fast as possible towards the door of their own house, which was at a short distance, and while Miss Sarah Porter was ringing the bell, the prisoner, who had followed them, stooped down, and struck Miss Anne Porter with great violence upon the hip; and that the blow was

(*a*) Williams's case, 1 Leach 533.

given with some sharp instrument, which tore and cut quite through her clothes, and gave her a very severe wound. Buller, J. told the jury that in order to constitute an offence within the statute, it was necessary, first, that the assault should be made in a public street or highway; (*b*) secondly, that it should be made wilfully and maliciously; thirdly, that it should be made with an intent to tear, spoil, cut, &c. the garments or clothes of some person; and, fourthly, that the garments or clothes of such person should be actually torn, spoiled, cut, &c. And upon the third point he stated, that if the intent of the prisoner was to cut both the clothes and the person, and in carrying such intention into execution the clothes alone were cut, it would clearly be within the meaning of the act; or if the intention was to injure the person only, and not to cut the clothes, yet if, in carrying such intention into execution, the assault was made with such an instrument, or under such circumstances as plainly shewed, that the execution of the intention to injure the person must unavoidably tear, spoil, cut, &c. the clothes, they might consider whether a person who intends the end does not also intend the means by which that end is to be attained. The jury found the prisoner guilty: but the question of intention, and another point which arose upon the form of the indictment, were submitted to the judges for their consideration; and a majority of them were of opinion that the case was not within the statute. They thought that, in order to bring a case within the statute, the *primary intention* must be the tearing, spoiling, cutting, &c. of the clothes; whereas in the present case the primary intention of the prisoner appeared to have been the wounding of the person of the prosecutrix. (*c*)

(*b*) This is also considered as the construction necessarily resulting from the words of the act in Fielding's Treat. on the penal laws relating to the metropolis, p. 317. and in 1 Hawk. P. C. c. 54. s. 2.

(*c*) Buller, J. appears to have retained the opinion which he gave to the jury at the consultation of the judges, and to have thought the case within the statute, upon the authority of Rex *v.* Coke and Woodburn, (*ante*, 849) He thought the case within the statute, be-

The indictment must allege that the clothes were torn, spoiled, cut, &c. *at the same time* that the assault was made with intent to cut them.

It should be observed, however, that the other point, upon the form of the indictment, is said to have been that on which the judgment, in this case, ultimately turned. The indictment stated, that the prisoner, on the 18*th day of January*, in the year, &c. made the assault, with intent to tear, spoil, cut, &c. and that *on the said* 18*th day of January*, he did tear, spoil, cut, &c. And all the judges agreed that it was bad, because it did not allege that the clothes were cut *at the same time* that the assault was made with intent to cut them; that, for any thing that appeared to the contrary on the face of the indictment, the assault might have been made on one part of the day and the tearing the clothes on another part of the day: and that it should have alleged, after stating the assault at the time and place mentioned, that the prisoner *then and there* tore, spoiled, cut, &c. the clothes of the prosecutrix. (*d*)

26 G. II. c. 19. s. 11. Assaulting persons on account of their discharge of their duty in the salvage of vessels in distress, or of vessels, goods, &c. wrecked, stranded, &c.

The statute 26 Geo. II. c. 19. relating to attempts to kill and destroy persons endeavouring to escape from a vessel in distress, or wrecked, has been already mentioned. (*e*) A subsequent section of the statute makes the assaulting persons on account of their discharging their duty in the salvage or preservation of any vessel in distress, or of any vessel or goods which may be wrecked, stranded, &c. an offence to be punished by transportation for seven years. It enacts, "that if any sheriff, or his deputy, justice of the peace, "mayor, or other magistrate, coroner, lord of a manor,

cause he considered the intent of the prisoner to have been to wound the party by cutting through her clothes, and therefore that he must have intended to cut her clothes; and that the jury, whose sole province it was to find the intent, had expressly so found it. 1 East. P. C. c. 8. s. 18. p. 424.

(*d*) Williams's case, 1 Leach. 529. 1 East. P. C. c. 8. s. 18. p. 424, 425. The prisoner was remanded to Newgate, and eight indictments were preferred against him for this outrage, and others of a similar nature, upon seven other ladies, as for misdemeanors at common law. Evidence was given upon three of them; and being convicted, he was sentenced to two years' imprisonment on each, and at the end of the six years, to find sureties for his good behaviour for seven years.

(*e*) *Ante*, 855.

"commissioner of the land tax, chief constable, or petty "constable, or other peace officer, or any Custom-house or "Excise officer, or other person lawfully authorized, shall "be assaulted, beaten and wounded, for or on account of "the exercise of his or their duty, in or concerning the "salvage or preservation of any ship or vessel in distress, "or of any ship or vessel, goods or effects, stranded, wrecked, "or cast on shore, or lying under water, in any of his ma- "jesty's dominions; then any person or persons so assault- "ing, beating and wounding, shall, upon trial and convic- "tion, by indictment at the assizes, or general gaol delivery, "or at the general or quarter sessions for the county, "riding, or division, where such offence shall be committed, "be transported for seven years to some of his majesty's "colonies in America; and shall be subject to such subse- "quent punishment, in case of return before that time, as other "persons under sentence of transportation are by the law "subjected unto." (*f*)

11 & 12 W. III. c. 7. Persons laying hands on the commander of a ship to hinder him from fighting are to suffer death.

The 11 & 12 W. III. c. 7. s. 9. enacts that "if any person "shall lay violent hands on his commander, whereby to "hinder him from fighting in defence of his ship and goods, "committed to his trust," he shall be adjudged to be a pirate, felon, and robber; and being convicted, shall suffer death and loss of lands, goods, &c. as pirates, felons, and robbers, upon the seas, ought to suffer. (*g*)

33 G. III. c. 67. s. 2. Obstructing seamen, or assaulting them with intent to obstruct and prevent them from pursuing their lawful occupations.

The 33 G. III. c. 67. provides for the punishment of persons obstructing seamen, keelmen, casters, and shipcarpenters, and preventing them from pursuing their lawful occupations. The second section enacts, that if any seaman, keelman, caster, shipcarpenter, or other person, shall unlawfully, and with force, prevent, hinder, or obstruct, any seaman, keelman, castor, or shipcarpenter, from working at, employing himself in, or exercising his lawful trades, busi-

(*f*) 26 Geo. II. c. 19. s. 11. By s. 18. the act is not to extend to *Scotland*.

(*g*) See this statute more at large, *ante*, 136, 137.

ness or occupation respectively, or shall wilfully and maliciously assault, beat or wound, or use or commit any bodily violence or hurt to or upon any seaman, keelman, &c. with the intent to deter, prevent, hinder, or obstruct, such seaman, keelman, &c. from working at, employing himself in, or exercising his lawful trade, business, or occupation, respectively, every seaman, keelman, &c. and other person, being lawfully convicted of any such offences, upon any indictment, in any court of oyer and terminer, or general or quarter sessions for the county, shire, riding, division or district, wherein the offence was committed, shall be committed either to the common gaol for the same county, &c. there to continue, or to the house of correction for the same county, &c. there to continue, and to be kept to hard labour, for any term not exceeding twelve nor less than six calendar months.

S. 3. a subsequent offence of the same kind made felony.

The third section enacts, that if any seaman, keelman, &c. or other person, shall be convicted of any of the offences aforesaid, in pursuance of this act, and shall afterwards offend again in like manner, every such seaman, keelman, &c. and other person so offending again in like manner, and being lawfully convicted thereof, upon any indictment, in any court of oyer and terminer, or general or quarter sessions for the county, &c. wherein the offence was committed, shall, for such second and every subsequent offence, be adjudged guilty of felony, and shall be transported to some of his majesty's dominions beyond the seas, for any space of time or term of years, not exceeding fourteen years, nor less than seven years.

Limitation of prosecutions.

The act contains a provision that no person shall be prosecuted by virtue of it for any of those offences, unless the prosecution be commenced within twelve calendar months after the offence committed. (*h*)

(*h*) 33 Geo. III. c. 67. s. 8. This act was at first only temporary; but it was made perpetual by the 41 Geo. III. c. 19. s. 4.

5 Eliz. c. 4. s. 21. servant, workman, &c. assaulting master, mistress, &c.

The 5 Eliz. c. 4. s. 21, enacts, that if any servant, workman, or labourer, shall wilfully or maliciously make an assault or affray upon his master or mistress, or upon any other having charge or oversight of such servant or labourer, or over the work wherein he is hired to work, and shall thereof be convicted before any two justices, or other head officer as aforesaid, by confession or oath of two witnesses, he shall be imprisoned for a year or less, by the discretion of two justices, out of a town corporate, and, in a town corporate, of the mayor or other head officer, with two others of the discreetest persons of the same corporation; and if the offence shall require further punishment, then to receive such other open punishment, so as it extend not to life or limb, as the justices in sessions, or the mayor or other head officer, and six or four at least of the discreetest persons of the corporation, shall think convenient for the quality of the offence.

12 G. I. c. 34. s. 6. Assault upon manufacturers, for not complying with illegal by-laws, &c.

The 12 G. I. c. 34. s. 6. enacts, "that if any person or "persons shall assault or abuse any master woolcomber or "master weaver, or other person concerned in any of the "woollen manufactories of this kingdom, whereby any such "master or other person shall receive any bodily hurt, for "not complying with, or not conforming, or not submitting, "to any such illegal by-laws, ordinances, rules or orders, "aforesaid," (namely, "by-laws, ordinances, rules or orders, "in unlawful clubs and societies, made or entered into by or "between any persons brought up in, or professing, using, or "exercising the art and mystery of a woolcomber or weaver, "or journeyman woolcomber, or journeyman weaver, in "any parish or place within this kingdom, for regulating "the said trade or mystery, or for regulating or setting the "prices of goods, or for advancing their wages, or for lessening their usual hours of work;" (*i*)) every person so "offending, being thereof lawfully convicted upon any in-

(*i*) The by-laws, &c. are thus described in the first section of the statute.

" dictment to be found within twelve calendar months next " after any such offence committed shall be adjudged guilty " of felony, and shall be transported for seven years." This provision is extended by the eighth section of the statute to " combers of jersey and wool, to framework knitters and " weavers, or makers of stockings, and to all persons what- " soever employed or concerned in any of the said manu- " factories." And it is also extended by the 22 G. II. c. 27. s. 12. to " journeymen dyers, journeymen hotpressers, and " all other persons whatsoever employed in or about any " of the woollen manufactories of this kingdom, and also to " journeymen, servants, workmen, and labourers, and all " other persons whatsoever employed in the making of felts " or hats, or in or about any of the manufactures of silk, mo- " hair, fur, hemp, flax, linen, cotton, fustians, iron or leather, " or in or about any manufactures made up of wool, fur, hemp, " flax, cotton, mohair or silk, or of any of the said materials " mixed one with another."

9 Anne, c. 14. s. 8. Assaults on account of money won at play.

The statute 9 Anne, c. 14., which was passed for the better preventing of excessive and deceitful gaming, makes provision for preventing *quarrels on account of gaming*. The eighth section enacts " that in case any person or persons " whatsoever shall assault and beat, or shall challenge or " provoke to fight any other person or persons whatsoever, " upon account of any money won by gaming, playing, or " betting at any of the games aforesaid, (namely, cards, dice, " tables, tennis, bowls, or other game or games whatsoever;) " (*j*) such person or persons assaulting and beating, or chal- " lenging, &c. upon the account aforesaid, shall, being there- " of convicted upon an indictment or information, forfeit to " her majesty, her heirs, and successors, all his goods, chat- " tels, and personal estate whatsoever, and shall also suffer " imprisonment in the common gaol of the county, where " such conviction shall be had during the term of two years."

(*j*) As to games considered as being within this statute, see *ante*, 595, 596.

Construction of the statute. Rex *v.* Randall and others. In this case it was supposed that the assault should arise during the time of playing.

In a case upon this section of the statute, it appeared that the prosecutor and the defendants were gaming together, and that the defendants proposed breaking up and going away; that the prosecutor having lost his money, objected to it, and wanted them to play on, complaining that they had won his money, and would not give him an opportunity of recovering it, upon which the defendants committed the assault. And it is said that Buller, J. upon this evidence, directed the jury to acquit the defendants; giving it as his opinion, that the game being over before the assault began, the assault could not be said to have arisen out of the game, but to have arisen from what the prosecutor had said to the defendants: and that it was necessary, in order to bring a case within the statute, that the assault should arise out of the play, and during the time of playing. (*k*) But this opinion is not supported by the judgment of the court of King's Bench in a subsequent case, where the same point came under consideration.

Rex *v.* Darley. In this case a different doctrine was established, namely, that an assault on account of money won at play, will be within the statute, though it be not committed till long after the play is over.

In the latter case, the indictment against the defendant contained three counts, two of which were framed upon the statute, and the third was for a common assault. After a general verdict of guilty, it was objected that the evidence did not warrant a verdict upon the counts framed upon the statute; because it appeared that the assault was not committed *at the time of the play*, but on *the day afterwards*; and then not on account of the money won at play, but on account of the abusive language which passed between the parties. The opinion of Buller, J. in the former case was cited; and it was urged, in corroboration of that opinion, that the great object of the statute was to repress such violence upon the spot, and at the very time of the gambling, when it might reasonably be imagined that ruined men, in the first paroxysm of despair, would be tempted to vent their passion in this manner. But Lord Ellenborough, C. J.

(*k*) Rex *v.* Randall and others, C. c. 8. s. 17. p. 423. *Bristol*, Sum. Ass. 1787. 1 East. P.

said, that the court would refer to the learned judge before whom the indictment was tried, to know in what manner the case was left to the jury; whether the assault were in fact made on account of the money won at play the day before, or on account of the ill language which had arisen afterwards upon the demand of payment being made. And he said that he could not go the length of the opinion in the case cited, and consider the words of the act as confined to an assault committed during the time of play; as it more frequently happened that disputes of that sort did not arise till after the play was over. The learned judge, before whom the indictment was tried, Mr. Justice Heath, being afterwards referred to, returned for answer, that he had directed the jury to acquit the defendant on the two first counts if they were not clearly satisfied that the defendant had assaulted the prosecutor *on account of the money won at play* by the prosecutor of the defendant; and that he had distinctly left it to them to decide whether the assault were *on that account, or on account of the abusive language then used*, and to acquit the defendant on those counts, if they were of opinion that the assault was on account of the abusive language.

Sentence may be passed pursuant to the statute after a general verdict of guilty, upon an indictment containing two counts on the statute and one for a common assault.

After this answer had been communicated from the bench, it was moved in arrest of judgment, that, the verdict being general, there would be inconsistent judgments on the several counts, one on the special counts on the statute which prescribed a positive punishment, and the other on the count for the common assault which was discretionary. (*l*) But the rule was afterwards abandoned, and sentence was passed upon the defendant pursuant to the directions of the statute. (*m*)

(*l*) Upon this point the case of Rex v. Young and others, 3 T. R. 103. was referred to.

(*m*) Rex v. Darley, 4 East. 174.

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